OPINIONS

OF THE

ATTORNEY GENERAL

AND

REPORT

TO THE

GOVERNOR OF VIRGINIA

From July 1, 1962 to June 30, 1963

Commonwealth of Virginia
Department of Purchases and Supplies
Richmond
1963
Letter of Transmittal

July 1, 1963

HONORABLE A. S. HARRISON, JR.
Governor of Virginia
State Capitol
Richmond, Virginia

My dear Governor Harrison:


Pursuant to the statutes, I have included in the report such official opinions rendered by this office during the above-stated period as would seem to be of general interest or helpful in promoting uniformity in the construction of the laws of the State, together with the required statement of cases now pending or disposed of since the last report issued by this office. Due to the increasing volume of tax collection cases on behalf of the Virginia Employment Commission, and habeas corpus proceedings, such cases have not been stated individually. A complete record of these cases is available in this office.

All opinions included in the report went out over the signature of the Attorney General. In the interest of economy, the signatures, salutations and portions of the addresses have been omitted.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General
### PERSONNEL OF THE OFFICE

(Post Office Address, Richmond)

<table>
<thead>
<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tr>
<td>Robert Y. Button</td>
<td>Culpeper County</td>
<td>Attorney General</td>
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<td>Kenneth C. Patty</td>
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<td>First Assistant</td>
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<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
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<td>Francis C. Lee</td>
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<td>Robert D. McIlwaine, III</td>
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<td>Reno S. Harp, III</td>
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<td>M. Ray Johnston</td>
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<tr>
<td>Margaret E. Bennett</td>
<td>Colonial Heights</td>
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<tr>
<td>Helen B. Bowles</td>
<td>Goochland County</td>
<td>Receptionist</td>
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ATTORNEYS GENERAL OF VIRGINIA
From 1776 to 1963

Edmund Randolph..........................1776-1786
James Innes..................................1786-1796
Robert Brooke.............................1796-1799
Philip Norborne Nicholas.................1799-1819
James Robertson.........................1819-1834
Sidney S. Baxter..........................1834-1835
Willis P. Bocock..........................1852-1857
John Randolph Tucker....................1857-1865
Thomas Russell Bowden...................1865-1869
Charles Whittlesey (military appointee)..1869-1870
James C Taylor.........................1870-1874
Raleigh T. Daniel.......................1874-1877
James G. Field.........................1877-1882
Frank S. Blair............................1882-1886
Rufus A. Ayers............................1886-1890
R. Taylor Scott..........................1890-1897
R. Carter Scott..........................1897-1898
A. J. Montague.........................1898-1902
William A. Anderson....................1902-1910
Samuel W. Williams......................1910-1914
John Garland Pollard....................1914-1918
*J D. Hank, Jr............................1918-1918
John R. Saunders.........................1918-1934
†Abraham P. Staples.....................1934-1947
‡Harvey B. Apperson....................1947-1948
§J. Lindsay Almond, Jr...................1948-1957
#Kenneth C. Patty.......................1957-1958
A. S. Harrison, Jr......................1958-1961
Frederick T. Gray.......................1961-1962
Robert Y. Button.........................1962-

*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to
fill the unexpired term of Hon. John Garland Pollard and served until February 1,
1918.

†Hon. Abram P. Staples was appointed Attorney General on March 22, 1934 to
fill the unexpired term of Hon. Jno. R. Saunders and served until October 6, 1947.

‡Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947,
to fill the unexpired term of Hon. Abraham P. Staples and served until his death
on January 31, 1948.

§Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General
Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B.

#Hon. Kenneth C. Patty was appointed Attorney General on September 16,
1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until

Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to
fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF APPEALS


Doughty, James Tankard v. Commonwealth of Virginia. From Circuit Court of Accomack County. Plaintiff in error convicted of driving while under the influence of alcohol. (Section 18.1-54) Affirmed.


Timmons, Jay R. v. Commonwealth of Virginia. From Corporation Court of the City of Norfolk, Part II. Appeal from conviction of first degree murder. Affirmed.


CASES PENDING IN SUPREME COURT OF APPEALS


County School Board of Prince Edward County, Virginia, et al. v. Leslie Francis Griffin, Sr., et al. Appeal from judgment of Circuit Court of City of Richmond construing Virginia school laws.


Legum, Edward v. H. H. Harris, State Highway Commissioner. Appeal from Corporation Court of the City of Norfolk. Mandamus proceeding seeking to compel the Commissioner to institute condemnation proceeding for alleged damage to real property.


Moore, Cordies, et al. v. State Highway Commissioner. From the Corporation Court of the City of Norfolk. Appeal in condemnation proceeding.


CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Rees, Melvin Davis, Jr. v. Commonwealth. Petition for writ of certiorari to review judgment of Supreme Court of Appeals denying writ of error to judgment of conviction for murder. Certiorari denied.

Retail Clerks International Association, Local 1625, AFL-CIO, and William Travis, President of Retail Clerks International Association, Local 1625, AFL-CIO, v. Alberta Schermerhorn, Lois Devita, Joyce E. Thuro and Larry Stark. From the Supreme Court of Florida. Amicus Curiae brief filed by the Attorney

**CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES**


**CASES TRIED OR PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

*Griffin, Cocheysie J. et al v. County School Board of Prince Edward County, et al.* Appeal from order of District Court in Prince Edward school segregation case. Pending.


**CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS**


REPORT OF THE ATTORNEY GENERAL

Maryland and Virginia Milk Producers Association, Inc. v. The State Milk Commission. Petition for declaratory judgment and injunction. Injunction granted.
United States of America v. Prince George County School Board. Suit to require admission of military related children to public schools of county on racially nondiscriminatory basis. Commonwealth dismissed as party defendant and relief granted.

CASES TRIED OR PENDING IN THE CIRCUIT, HUSTINGS, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE

Commercial Laundry Company, Inc. v. City of Norfolk and Commonwealth of Virginia. Circuit Court of the City of Richmond. Motion for judgment. Claim for damage to real property resulting from construction of highway.
Commonwealth of Virginia v. William Webb, G. & S. Leasing Corporation, Goad and Slocombe, Incorporated. (Two cases). Action to collect motor vehicle


*Elder v. Crews.* Circuit Court for County of Chesterfield. Motion for judgment for defamation. Pending.


*New Mexico Seed Farms, Inc. v. Commissioner of Agriculture and Immigration.* Circuit Court, City of Richmond. Appealed from decision of Commissioner refusing to amend or repeal rules and regulations establishing sorghum alnum as a noxious weed seed. Commissioner's decision affirmed.


*Powell, Vadie L. v. H. H. Harris, State Highway Commissioner, et al.* Circuit Court, City of Richmond. Motion for judgment, damages to real property. Dismissed upon motion of petitioner.

of Richmond. Petition for refund of State tax on capital not otherwise taxed. Pending.

**Rhodes-Jackson Corporation v. Commonwealth of Virginia.** Circuit Court, City of Richmond. Petition for refund of State taxes on capital not otherwise taxed. Pending.


**Shaia, et al v. City of Richmond.** Hustings Court, City of Richmond. Application for correction of erroneous assessment of taxes. Pending.

**Shell Oil Company v. Commonwealth of Virginia.** Circuit Court, City of Richmond. Application to secure reimbursement of taxes paid on aviation fuel. Pending.

**Thorington Construction Company, Incorporated v. Medical College of Virginia.** Law and Equity Court, City of Richmond. Motion for judgment of breach of contract. Compromised and settled.

**Virginia Iron, Coal & Coke Co., etc. v. H. H. Harris, State Highway Commissioner, et al.** Circuit Court, City of Richmond. Motion for judgment for damages in highway construction. Pending.

**West, Louella v. Medical College of Virginia.** Circuit Court, City of Richmond. Suit in chancery for reinstatement of nursing privileges. Relief denied.

**Williams, Edgar E. Sr. v. Commonwealth of Virginia.** Circuit Court, City of Richmond. Application for correction of erroneous assessment of taxes. Pending.


**CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED**

**Amos, Hubert Wade v. C. H. Lamb, Commissioner, Division of Motor Vehicles.** Circuit Court for the City of Newport News. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-459. Suspension period terminated. Petition withdrawn.

**Bolen, Larry E. v. Commonwealth of Virginia, Commissioner of the Division of Motor Vehicles.** Circuit Court of the City of Norfolk. Appeal from an action of the Commissioner suspending operating and registration privileges pursuant to Sections 46.1-59 and 46.1-167.4. Pending.


**Cooper, Clark Leslie v. C. H. Lamb, Commissioner, Division of Motor Vehicles.** Circuit Court of Frederick County. Appeal from an action of the Commissioner suspending operator's license and registration plates because of involvement in an accident and a finding of not free of blame. Action of the Commissioner affirmed and appeal dismissed.

REPORT OF THE ATTORNEY GENERAL

of Division of Motor Vehicles. Court of Hustings for the City of Portsmouth. Commissioner C. H. Lamb dismissed as party defendant.

Gills, George William and Clara Stone v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's licenses and suspending registration privileges under Section 46.1-167.2. Pending.

Hester, Clarence Albert v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Mecklenburg County. Appeal from an action of the Commissioner suspending operator's license under Section 46.1-449. Dismissed agreed.

Lassiter, Norman Eugene, Jr., v. Commissioner of the Division of Motor Vehicles. Circuit Court of Norfolk County. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-449. Petitioner complied with Safety Responsibility Act; order withdrawn and pleading withdrawn without docketing.

Mawyer, George Lee v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of the City of Richmond. Appeal from an action of the Commissioner revoking operator's license and suspending registration in accordance with the provisions of Sections 46.1-417 and 46.1-418 of the Code. Dismissed.


Myers, Willie Harris v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Pittsylvania County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-417 for a period of one year and suspending registration pursuant to Section 46.1-418 of the Code. Dismissed.

Sheets, Hugh Samuel v. C. H. Lamb, Commissioner, Division of Motor Vehicles. Circuit Court of Tazewell County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.


Sherwood, Frank M. and Helen Langan v. Commissioner of Motor Vehicles. Circuit Court for Fairfax County. Appeal from an action of the Commissioner suspending the operator's licenses and privileges to operate motor vehicles and registration privileges in accordance with the provisions of Sections 46.1-442 and 46.1-446 of the Code. Pending.


Wallingsford, Emery David v. Commissioner of the Division of Motor Vehicles. Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license and registration under Section 46.1-449. Pending.


Wilkerson, Robert Carroll v. Chester H. Lamb, Commissioner, Division of Motor
Vehicles. Circuit Court of Henrico County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-419. Stay vacated and appeal dismissed.

*Defendants include the Attorney General, the Commissioner, Department of Taxation, Commissioner, State Corporation Commission and Commissioner, Division of Motor Vehicles.

CASE TRIED BEFORE THE STATE CORPORATION COMMISSION OF VIRGINIA

(Complainants include the Attorney General of Virginia and The Commissioner of the Division of Motor Vehicles.)


CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE IN WHICH THE UNEMPLOYMENT COMPENSATION COMMISSION (VIRGINIA EMPLOYMENT COMMISSION) WAS INVOLVED


For sake of brevity, the cases instituted for the collection of unemployment compensation taxes have not been listed individually. Seventy-seven such cases were instituted in the Circuit Court of the City of Richmond, records of which are on file at the Virginia Employment Commission office.
REPORT OF THE ATTORNEY GENERAL

HABEAS CORPUS CASES

A total of 280 habeas corpus cases were handled during the past fiscal year. Records are on file in the Office of the Attorney General.

EXTRADITION HEARINGS CONDUCTED AND REPORTS SUBMITTED PURSUANT TO REQUEST OF THE GOVERNOR

<table>
<thead>
<tr>
<th>Date</th>
<th>Attorney Name</th>
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<td>July 10, 1962</td>
<td>James A. Harris, Jr.</td>
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<td>July 26, 1962</td>
<td>Paul Simpson</td>
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<td>August 16, 1962</td>
<td>Dale H. Pufahl</td>
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<td>William Dean</td>
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<td>John A. Sylvester</td>
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<td>Luther P. Webster</td>
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<td>October 23, 1962</td>
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<td>George Stafford</td>
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<td>May 29, 1963</td>
<td>Nelson Chisholm</td>
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OPINIONS

ACKNOWLEDGMENTS—Foreign State—Form acceptable.

HONORABLE J. FULTON AYERS
Clerk, Circuit Court of Accomack County

This is in reply to your letter of August 31, 1962, in which you raise several questions pertaining to the validity of an acknowledgment taken outside the State before a Notary Public.

Section 55-113 of the Code of Virginia, (1950), sets forth the form of acknowledgment required as a condition to submitting a writing to record. The Supreme Court of Appeals of Virginia has given a very liberal interpretation to the provision of this statute, which requires the acknowledgment to be "substantially" in accord with the specified form.

There is no requirement for a Notary Public outside of this State to affix his seal or the date on which his term of office expires.

The fact that the Notary in this particular case stated in the acknowledgment that it was in the State of Texas, City of Houston, although his seal was for the County of Harris, Texas, would appear to be of no legal consequence so long as the acknowledgment appears to be in substantial compliance with § 55-113 of the Code.

ALCOHOLIC BEVERAGE CONTROL LAWS—Hours for Sale of Wine and Beer—How violations charged.

SUNDAY—Sale of Alcoholic Beverages—How violations prosecuted.

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will acknowledge your letter of April 15, 1963, in which you ask my opinion on the following questions:

(1) "... if there is no town ordinance in an incorporated town prohibiting and regulating the time of the sale of wine and beer between Saturday midnight and Monday morning, would any establishment or restaurant in the incorporated town who has a regular license to dispense wine and beer, have the right to sell wine and beer after Saturday midnight and any hour during the Sunday hours?"

(2) "If there is a town ordinance regulating the time as to the sale of wine and beer and this should be violated, would it be proper to issue a state warrant or a town warrant?"

Under §§ 4-36 and 4-114.1 of the Virginia Code, the Virginia Alcoholic Beverage Control Board is directed to prescribe by regulation between what hours and on what days wine, beer, and "beverages" as defined in §4-99, may not be sold or allowed to be consumed upon the premises of any licensed establishment. Your attention is invited to Sections 5 and 8 of the Regulations of the Board from which it is evident that licensees of the Board generally may not sell wine, beer, and "beverages" between the hours of 11:00 P.M. and 6:00 A.M. of the prevailing time in the jurisdiction concerned. The Board can fix, and has fixed in several instances, different restricted hours for some localities. In the absence of a
valid ordinance prohibiting the sale of wine and beer, or either, on Sunday, it would seem that licensees may sell the same during the unrestricted hours on Sunday as long as there is no violation of other general laws, such as, for instance, §18.1-358 of the Code.

In regard to your second question, the Legislature under §4-97 of the Code has expressly conferred upon the governing bodies of counties, cities, and towns the power to adopt ordinances, within certain limitations set forth in the statute, prohibiting the sale of beer and wine, or either, between the hours of 12:00 P.M. of each Saturday and 6:00 A.M. of each Monday, or to fix hours within said period during which the same may be sold. It would seem, therefore, that the violation of a valid town ordinance exercising this power would be an offense against the town for which a town warrant may properly issue.

You will note that under §4-97, retail licenses for the sale of beer and wine, or either of them, issued by the Board after the adoption of a “Sunday ordinance” duly certified by the clerk of the governing body adopting the same and transmitted to the Board, shall be limited in accordance with the provisions of such ordinance; that the provisions of such ordinance have like effect upon the sale of “beverages”; and that licensees during the prohibited hours shall not permit the consumption of either wine, beer or “beverages” upon the licensed premises. It would seem, therefore, that a sale of wine and beer, or either, during the hours prohibited by the ordinance, would be an offense against the town and the State, for which a town or state warrant could issue. In connection with the offense against the state, see also §4-60. A sale of “beverages,” or permitting the consumption on the licensed premises of wine, beer or “beverages,” would constitute state offenses in violation of §4-97. Of course, where the same act constitutes more than one offense, a conviction upon one charge will bar prosecution of the other offenses under §19.1-259.

ALCOHOLIC BEVERAGE CONTROL LAWS—Storage of Beverage in Warehouse—When wholesale merchant’s license tax applicable.

TAXATION—Wholesale Merchant’s License—When applicable to warehouse storage of alcoholic beverage.

January 17, 1963

ADMIRAL D. H. CLARK
Executive Director
Virginia State Ports Authority

This is in reply to your letter of November 30, 1962, in which you request my opinion in the following matter:

"Representatives of this Authority recently had contact with a representative of a large United States distilling company not domiciled in Virginia, which imports and distributes considerable quantities of Scotch whiskey, and has in mind the possibility of using Hampton Roads as the ports of entry for certain quantities of these whiskies. They propose to warehouse these whiskies in Virginia and distribute to destinations in Virginia and other states. The representative was interested to learn of the 1962 amendment of the ABC Act (Section 4-84.1 of the Code) which permits alcoholic beverages not under United States Customs bond or Internal Revenue bond to be transported into Virginia and stored in warehouses which have been approved by the ABC Board for that purpose.

"The specific question has arisen as to whether, in light of the provisions of the 21st Amendment to the Federal Constitution in relation to
the Export-Import Clause of Article I of the Constitution, which latter forbids any state to lay imposts or duties on imports or exports except as may be absolutely necessary for executing its inspection laws, these imports would be subject to the Wholesale Merchants License Tax (Sections 58-304 et seq of the Code), which is based upon the amount of purchases.

"The Authority would appreciate an opinion from you as to whether the company would be liable for the Wholesale Merchants Taxes in this proposed warehousing and destination operation."

For the purposes of this opinion it is assumed that the foreign distiller is duly licensed to manufacture and/or sell alcoholic beverages in the state of its domicile, but not in Virginia, and that the warehouse is not under United States customs bonds or internal revenue bonds, but is one that has been approved by the Alcoholic Beverage Control Board pursuant to § 4-81.1 of the 1950 Code of Virginia, as amended.

Under § 4-58 of the 1950 Code of Virginia, as amended, it is a misdemeanor for any person not licensed by the Alcoholic Beverage Control Board to sell any alcoholic beverages other than as permitted under the provisions of the Alcoholic Beverage Control Act. Under § 4-2 (23) of the Code it is provided that, unless it otherwise clearly appears from the context, the terms "sale" and "sell" shall include "exchange, barter and traffic, and any delivery made otherwise than gratuitously, by any means whatsoever, of alcoholic beverages; to solicit or receive an order for alcoholic beverages; to keep, offer or expose the same for sale; to peddle."

Under § 4-89 (f) of the Code it is provided that Chapter 1 of Title 4 (§§ 4-1 to 4-98, inclusive) shall not be construed to prevent "any person duly authorized to manufacture and sell, or either, in Virginia or elsewhere, alcoholic beverages other than beer, from soliciting and taking orders from the Board for such alcoholic beverages."

It is provided in § 4-84 (a) of the Code that distilled spirits, with certain exceptions inapplicable here, may not be brought into this State, unless consigned to the Board. A pertinent exception is provided in § 4-84.1 which permits distilled spirits, not under United States customs bonds or internal revenue bonds, to be transported into Virginia and stored in Virginia in warehouses which have been approved by the Board for that purpose; and to be released from such warehouses on permits issued by the Board for delivery to the Board or to persons entitled to receive the same in Virginia or outside of the State.

Up to this point, it would seem that the foreign distiller may solicit orders from the Board, and may fill such orders from spirits received in a warehouse in Virginia that has been approved by the Board, without being in violation of any provision of the Alcoholic Beverage Control Act, and without having obtained any license from the Board.

It is to be noted that the foreign distiller is not authorized to solicit and take orders in Virginia from anyone other than the Board; if he does so, he would be in violation of § 4-58.

Often the place where goods are delivered to a carrier for shipment to the buyer is the "place of sale," but this may not necessarily be true in all cases. Assuming, as to distributions to be made to persons entitled to receive the same in Virginia or outside the State, that Virginia is not the "place of sale," the distiller would not require a license from the Board in such cases.

We come now to a consideration of the liability of the foreign distiller for a wholesale merchant's license. Under our assumed facts, the distiller regularly imports distilled spirits into Virginia, keeping them in a warehouse approved by the Alcoholic Beverage Control Board; the customs duties or internal revenue taxes have been paid and the spirits have been released from customs and reached their final destination in Virginia; subsequently, orders from purchasers in Virginia are filled from the stock located in the Virginia warehouse. In my opinion, this probably constitutes doing business in Virginia to the extent that a State
wholesale merchant's license would be required. Although the question may not be free from doubt, it is my further opinion that such a license would not be objectionable on the ground that it violates the Import-Export Clause of Article I, Section 10, of the Constitution of the United States.

Finally, it might be noted that the foreign distiller would not incur any liability for local licenses to any city or town, insomuch as it is not a licensee of the Virginia Alcoholic Beverage Control Board. See Michie's 1950 Code of Virginia, as amended, §§ 4-38, 4-96.

ARRESTS—Game Wardens—No authority to arrest person in possession of stolen boat.

GAME AND INLAND FISHERIES—Game Wardens—No authority to arrest one in possession of stolen boat.

HONORABLE CHESTER F. PHELPS
Executive Director
Commission of Game and Inland Fisheries

This is in reply to your letter of August 15, 1962, in which you request my opinion as to whether a game warden has authority to arrest a person having in his possession a stolen boat or outboard motor.

The authority of game wardens relating to boats is codified in § 62-174.17 of the Code of Virginia (1950), as amended. There are many offenses involving the possession of boats other than those set forth in Chapter 11.1 of Title 62 over which the game wardens have no specified jurisdiction. For example, see §§ 18.1-161 through 18.1-167 of the Code. In the enforcement of such criminal statutes, a game warden has no authority beyond that which is vested in any citizen to arrest one in the act of committing a crime.

I am of the opinion that the authority of game wardens to make arrests does not extend to arresting the person having in his possession a stolen boat or outboard motor.

ATTORNEYS—Compensation in Criminal Cases—How paid when court-appointed.

CRIMINAL PROCEDURE—Costs—Fees for court-appointed attorneys.

HONORABLE WILLIAM J. HASSAN
Commonwealth's Attorney for Arlington County

This will acknowledge your letter of January 4, 1963, in which you present the following question:

"A person is charged with a felony and an attorney is appointed by the Court to defend such person. The attorney does appear and defend the accused and the Court places the defendant on probation and allows an attorney's fee pursuant to Sec. 14-181 of the Code. Subsequently, at a later date, the defendant is brought back into Court on a motion to revoke probation and the Court calls on the attorney previously appointed to represent the defendant. Does the statute authorize the payment of an attorney's fee to the attorney on the subsequent motion to revoke probation?"
This question has not previously been considered by this office.

It seems clear from the case of Slayton v. Commonwealth, 185 Va. 357, that in proceedings had under § 53-275 of the Code the person who is on probation would be entitled to a judicial hearing thereon. This same case holds that a proceeding of this nature is not a trial for the commission of a new criminal offense. However, in my opinion, the probationer is entitled to counsel. The Court may, of course, designate the same attorney who had represented the defendant in the original proceedings, or the Court may appoint another attorney. It would seem that in either instance counsel for the defendant should be paid. Whether or not this payment may be made under § 14-181 is not free from doubt.

If the Court is in doubt as to the applicability of § 14-181 in such case, it would seem that the compensation of the attorney could be paid under § 19.1-315 of the Code. Under this section, it is provided that:

"... When in a criminal case an officer or any person renders any other service in the State for which no specific compensation is provided, the court in which such case is may allow therefor what it deems reasonable and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service . . ."
With respect to your second question, the magistrate, acting as bail commissioner, may go to the jail for the purpose of admitting a person to bail, but, in my opinion, such bail commissioner may order the prisoner to be brought before him under provisions of § 19.1-122 of the Code, which provides as follows:

“Any bail commissioner or clerk, or any court or judge thereof in vacation, to whom application is made, as herein provided, shall at once order the person held for trial to be brought before such commissioner, clerk, court or judge, and upon motion shall hear testimony and admit to bail or remand him to jail.” (Emphasis supplied.)

The surety on any recognizance must also appear before the justice of the peace so as to acknowledge his obligation as surety. Whenever a prisoner makes a cash deposit, in lieu of surety, the procedure set forth in § 19.1-130 of the Code applies.

BANKS—Branches—When State Corporation Commission may authorize branch when parent located within limits of city, town or county.

COUNTIES, CITIES AND TOWNS—Banks—When branches may be authorized.

HONORABLE WILLIAM F. STONE
Member, Virginia Senate

July 9, 1962

This is in reply to your letter of July 6, 1962, which reads as follows:

“Section 6-26 of the Code of Virginia of 1950 as amended, provides in effect that no Bank or Trust Company shall engage in business in more than one place except that the State Corporation Commission, when satisfied that public convenience and necessity will thereby be served, may authorize certain banks to establish branches in the limits of the City, Town or County in which the parent bank is located, etc. The General Assembly passed, at the 1962 session, a bill which is now designated as Section 6-27.1 of the Code of Virginia which provides that notwithstanding the limitations of Section 6-26, the State Corporation Commission may, when satisfied that public convenience and necessity will be served, authorize the establishment of branch banks in cities contiguous to the county or city in which the parent bank is located, provided that no such branch of any city parent bank shall be established more than five miles outside the city limits.

“It would be greatly appreciated if you would give me your opinion as to whether Section 6-27.2 would permit the establishment of branches where there are two incorporated towns in the same county which are not five miles apart; that is to say, if Incorporated Town A has a parent bank in it and is four and one-half miles from Incorporated Town B, which also has a parent bank in it, may the State Corporation Commission grant authority to the parent bank in Town A to establish a branch in Town B?”

I assume that your reference to § 6-27.1, in the first paragraph, was intended to refer to § 6-27.2.

The provision contained in § 6-27.2 of the Code prohibiting the establishment of a branch bank at a distance more than five miles outside the city limits is applicable only in those cases in which the parent bank is located in a city. The
question presented by you relates only to situations where the parent bank is located in a town and § 6-27.2 does not seem to be applicable. The establishment of a branch of a bank located in a town would seem to be subject to the provisions of § 6-26 of the Code. Under that section the State Corporation Commission, when the bank satisfies the Commission that "public convenience and necessity will thereby be served," may authorize qualifying banks to establish branches within the limits of the city, town or county in which the parent bank is located. The State Corporation Commission may, in its discretion, permit the establishment of a branch bank located in a town to establish a branch in another town located in the same county, regardless of the distance between the two towns.

-BOARDS OF SUPERVISORS—Compensation—How determined.

HONORABLE M. G. SIGLER
Clerk of Board of Supervisors
Shenandoah County

September 25, 1962

This will acknowledge receipt of your letter of September 24, 1962, in which you state that the Board of Supervisors of Shenandoah County is composed of six members, three of whom desire an increase in annual compensation, and three of whom do not, for various reasons; desire an increase. The compensation is now fixed at six hundred dollars per annum for each member. Under § 14-56.1 of the Code of Virginia, it is provided:

"After January one, nineteen hundred and sixty, the annual compensation to be allowed each member of the board of supervisors of any county, to be determined by the board within the limits hereinafter set forth, shall be as follows:

"**

"Shenandoah—not less than six hundred nor more than nine hundred dollars, with an additional sixty dollars to the chairman."

Section 14-57 of the Code, relating to the compensation of the members of a board of supervisors, was repealed by Chapter 340, Acts of 1958, to be effective January 1, 1960, and hence may no longer be considered in determining such compensation.

You present the following questions:

"We have two questions in this connection. First, must the increase be unanimously approved by the Board for all the members? Or, second, that since all salary checks are read and approved by the Board, would it be legal for those members so desiring an increase, to have their checks written for their maximum allowance and continue to write the checks for the remaining members on the basis of a yearly salary of $600.00?"

With respect to your first question, I am of the opinion that it will be necessary for the board to adopt a resolution fixing the annual compensation of the members within the limits prescribed by § 14-56.1 of the Code, and I am of the further opinion that the compensation of the members must be uniform; that is, the compensation may not be fixed so that one or more members shall be entitled to a different amount than any other member, except the extra allowance that may be paid to the chairman.

Section 15-245 of the Code provides how all questions submitted to the board shall be determined. The pertinent language is as follows:
"All questions submitted to the board for decision shall be determined by viva voce vote of a majority of the supervisors voting on any such question."

Under this section, if there is a quorum present, if a majority of those present and voting on any question cast their votes in favor of a proposal, the proposal is adopted. See opinions of this office, published in the Reports of the Attorney General (1950-1951) and (1959-1960), pp. 29 and 18, respectively. I enclose copies of each of these opinions.

In light of these observations, I must conclude that both questions presented by you must be answered in the negative.

BOARDS OF SUPERVISORS—Compensation—Maximum for Loudoun County.

April 29, 1963

HONORABLE J. T. MARTZ
Clerk of the Circuit Court of Loudoun County

This is in reply to your letter of April 27, 1963, in which you refer to § 14-56.1 of the Code, which provides:

"After January one, nineteen hundred and sixty, the annual compensation to be allowed each member of the board of supervisors of any county, to be determined by the board within the limits hereinafter set forth, shall be as follows:

"**

"Loudoun—not less than four hundred nor more than one thousand dollars and the board may fix a higher salary for the chairman than for the other members of the board; * * *"

You have requested my opinion as to whether or not the language relating to Loudoun County means that no member, including the chairman, is entitled more than $1,000, or whether it means that all members, with the exception of the chairman, may receive up to $1,000 and that the chairman may receive any figure within reason in excess of the $1,000.

In my opinion, this provision places a limitation of $1,000 upon the salary of all members of the board of supervisors. I do not think it can be construed to authorize a payment to the chairman in excess of $1,000 per annum. This section, in my opinion, merely means that the board of supervisors may fix the salary of the chairman at a higher figure than that of the other members providing it does not exceed the maximum limit of $1,000.

BOARDS OF SUPERVISORS—Meetings—Authority to hold executive sessions.

August 22, 1962

HONORABLE HAROLD H. PURCELL
Member, Virginia State Senate

This will acknowledge receipt of your letter of August 21, 1962, which reads as follows:

"Section 15-244 of the Code of Virginia requires the Board of Supervisors to sit with Open Doors, and permits any person to attend its meetings."
"The question has arisen here as to whether or not this prohibits the Board from going into Executive Session before a vote is taken.

"I do not know whether or not you have been called upon to rule on this matter, and would appreciate your advising me whether or not this Section of the Code prohibits the Board of Supervisors from going into Executive Session."

Section 15-244 of the Code provides that:

"The board of supervisors shall sit with open doors and all persons conducting themselves in an orderly manner may attend its meetings. It may require the sheriff of the county or, at his option, one of his deputies, to attend its meetings and preserve order, or discharge such other duties as may be necessary to the proper dispatch of the business before it."

The language of § 15-244 specifically provides that "all persons conducting themselves in an orderly manner may attend its meeting, and the board may require the sheriff, or a deputy, to attend its meetings and preserve order." The board, when voting on a question, is still in session—holding a meeting—and, in my opinion, it has no authority to exclude any persons conducting themselves in an orderly manner from the meeting. Furthermore, I am of the opinion that the statute prevents a board of supervisors from going into executive session for the purpose of discussing a matter and subsequently opening the doors to the public when voting upon a question.

I am enclosing copy of an opinion dated September 13, 1954, published in Report of the Attorney General (1954-1955), p. 14, which related to § 15-244. While this opinion does not specifically concern your question, it indicates that the Attorney General in office at that time felt that this Code section would be applicable to official meetings of a board of supervisors.

CITIES—Colonial Heights Ordinance—Provision for sergeant and justice of peace construed.

HONORABLE G. WOODY STAFFORD
Commonwealth's Attorney for the City of Colonial Heights

This is in reply to your letter of August 15, 1962, in which you enclose copy of City Ordinance No. 62-24, and request my advice as to the validity of Section 4 of the Ordinance. This section reads as follows:

"That the duties or powers of the city sergeant and the several justices of the peace of the City of Colonial Heights shall not extend to the regulation of motor vehicular traffic in the city, the enforcement of traffic regulations of the city, or arrest for the violation of any city traffic regulation or city motor vehicle law, and said city sergeant or justices of the peace shall not interfere with the members of the city police department while in the performance of their duties in the regulation of traffic or the enforcement of the motor vehicle laws of the city, as aforesaid."

I am unable to find any provision in the Charter of the City of Colonial Heights relating to the duties of the city sergeant. In the absence of such provision, he may perform all of the duties prescribed by general law and, of course, the city council does not have any authority to interfere with the sergeant in the performance of such duties.
The authority of a justice of the peace in the City of Colonial Heights is set forth in Section 19.11 of the City Charter.

I am of the opinion that the city council does not have authority to diminish any of the powers and duties of a justice of the peace. The justice of the peace has authority to bail persons charged with misdemeanors or violations of the city ordinances. If Section 4 of the ordinance under consideration is construed to prevent a justice of the peace from exercising his authority in this connection, then, of course, the Charter provision to that extent would be unenforceable. Any person arrested by a police officer of the city for a violation of the traffic ordinances would have the right to apply promptly to the justice of the peace for bail.

If Section 4 of the Ordinance in question is to be construed to the extent that when a justice of the peace grants bail to a person arrested for violation of the traffic ordinances that would constitute an interference with the members of the city police department, then the ordinance is invalid to that extent.

Because the city Charter does not prescribe the duties of the city sergeant, the provisions of § 15-417 of the Code will apply.

CITIES—Consolidation—Agreement between South Norfolk and Norfolk County.

HONORABLE GORDON F. MARSH
Member, Virginia State Senate

April 8, 1963

This will acknowledge receipt of your letter of March 8, 1963, in which you call attention to the Consolidation Agreement, entered into on the 22nd day of December, 1961, between the City of South Norfolk and Norfolk County, which provided for the consolidation of the two political units into a city pursuant to the provisions of Article 4, Chapter 9, Title 15 of the Code of Virginia. You direct attention to the provisions of Section VII of the Agreement and to the terminal sentence of Section 6.06 of the City Charter of the City of Chesapeake—Chapter 211 of the Acts of Assembly of 1962.

Section VII of the Agreement is divided into three subsections, as follows:

"VII. Disposition of Property and Assumption of Debts.

"1. Upon the effective date of consolidation all property, real and personal, of the City of South Norfolk and Norfolk County, including sanitary districts therein, shall become the property of the Consolidated City, and any and all indebtedness and other obligations of the city and the county, including sanitary districts therein, shall be assumed by the Consolidated City.

"2. The areas comprising the City of South Norfolk, Norfolk County and any sanitary district which has bonds issued and outstanding on the effective date of consolidation shall be continued in effect as special taxing districts for a period of not more than 20 years for the purpose of repaying any indebtedness chargeable to such areas. The council of the Consolidated City shall levy a special tax on locally taxable property within such districts in such amounts as may be necessary to repay such indebtedness, to the end that all indebtedness existing on the effective date of consolidation shall be repaid by the area creating the indebtedness.

"3. From the date of this agreement until the effective date of consolidation neither the City of South Norfolk nor Norfolk County, nor any sanitary district therein, shall issue any bonds which shall not mature on or before 20 years after the effective date of consolidation."

Section XVII of the Agreement provides that the Charter is incorporated by reference as a part of the Agreement. This section reads as follows:
"The charter for the Consolidated City is attached hereto and incorporated by reference as a part of this consolidation agreement. The governing bodies of the City of South Norfolk and Norfolk County shall submit the charter to the 1962 session of the General Assembly of Virginia for approval and shall have authority to negotiate any revisions that may be proposed by the General Assembly."

Section 6.06 of the City Charter is, in part, as follows:

"... The full faith and credit of the city are hereby pledged for the payment of the principal of and interest on all bonds and notes of the City of South Norfolk and of Norfolk County, and any sanitary districts therein, issued and outstanding on the effective date of this charter, and of the city hereafter issued pursuant to this chapter, except revenue bonds made payable solely from revenue producing properties, whether or not such pledge be stated in the bonds or notes or in the bond ordinance authorizing their issuance."

Section 1 of the Charter provides that the Consolidation Agreement is incorporated by reference as a part of the Charter. This section reads as follows:

"1. The consolidation of the city of South Norfolk and Norfolk County into a consolidated city of the first class, as provided in the consolidation agreement which is made a part hereof by reference, as approved at the referendum held on February 13, 1962, is hereby validated, ratified and confirmed in all respects, effective on and after January one, nineteen hundred sixty-three."

In your letter you state as follows:

"When the merger of Norfolk County and South Norfolk was under consideration, we gave considerable thought to the problem of guaranteeing the payment of bonded indebtedness which each political subdivision would owe as of the effective merger date. "Equity dictated that the districts existing receiving special benefits, such as sanitary sewage districts, should repay the debt created for that service. Accordingly, Section VII, paragraph 2 of the consolidation agreement provided for the continuation of these debt districts and for the new City of Chesapeake to levy a special tax in each such district for debt retirement purposes. This section of the agreement in paragraph 1 and Section 6.06 of the charter provide that all debt of the City of South Norfolk, Norfolk County and any sanitary districts therein shall be assumed by the new City of Chesapeake. Section 6.06 of the charter goes on to state that the full faith and credit of the new city are pledged to the payment of these obligations. Chapter 211, Acts of Assembly, Regular Session 1962, at page 301, recites the charter."

You further state that while the Council and other officials of the City of Chesapeake believe that the full faith and credit of the City of Chesapeake is pledged to the payment of all outstanding bonds through the levy and collection of an ad valorem tax, the question has been raised as to the interpretation of the provisions of Section VII of the Agreement and Section 6.06 of the Charter. You further state:

"When the sanitary district bonds were sold last fall they were rated BAA by Moody's Investors Service, whereas Norfolk County has a substantially higher rating of AA. Various underwriters who bought and still own these bonds feel that a rating should now be assigned to the City of Chesapeake which would cover bonds heretofore issued by the
City of South Norfolk, Norfolk County and the sanitary districts. Moody's is still rating these bonds separately as if the consolidation had not taken place, but has indicated that it will rate them all A if a favorable clarifying opinion is obtained from the Attorney General."

As I understand your problem, the basic question involved is whether or not paragraph (2) of Section VII of the Agreement has any effect upon the full faith and credit provisions set forth in Section 6.06. Ordinarily, when the full faith and credit of a political subdivision is pledged the unlimited taxing power of the political subdivision is unconditionally available for the purpose of paying the interest and principal of its bonds.

When the obligations in question were issued, the liability for payment was fixed. That liability is not changed, but it is actually emphasized, by the provisions of the Agreement. The City of Chesapeake assumed this liability under Section VII, subsection (1) of the Agreement, which, as previously noted, is specifically made a part of the Charter. Subsection (2) of Section VII of the Agreement requires the council of Chesapeake to provide for the payment of the bonds in accordance with the terms upon which they were issued. It follows that the property owners of the city outside the area for which the bonds were issued are entitled to rely upon compliance with Subsection (2) of Section VII of the Agreement. This is true with respect to bonds issued prior to the favorable referendum on the Agreement and also to bonds issued between the date the Agreement was ratified by a vote of the people and the effective date of the consolidation. Subsection (3) of Section VII was, in my judgment, included in the Agreement for the purpose of requiring any bonds issued during the interim—that is, between the date of ratification of the Agreement and the effective date of the consolidation—to be obligations payable in accordance with the provisions of Section VII (2) of the Agreement.

While I am of the opinion that a bondholder may rely on the taxing power of the City of Chesapeake for the payment of any bonds he may hold that were originally issued as obligations only of the City of South Norfolk, Norfolk County or a sanitary district, as the case may be, I am also of the opinion that the primary obligation for the payment of the bonds is upon the taxable property in the area that issued the bonds. The power to levy a special tax for the purpose of discharging this obligation is authorized in Section 2.02(b) of the Charter, which reads as follows:

"To levy a special tax on locally taxable property in any borough, sanitary district or other special taxing district of combination thereof, for a period of not exceeding 20 years, which may be different from and in addition to the general tax rate throughout the city, for the purpose of repaying indebtedness existing on the effective date of this charter and chargeable to such borough, sanitary district or other special taxing district or combination thereof."

In my opinion, Section 6.06 of the Charter is intended to authorize the bondholders to enforce collection of the securities from the city as a whole only after exhausting the remedies available for payment out of revenues produced solely from the area for which the bonds were issued.

It is not the intent of this provision of the Charter to authorize the governing body of the city to levy and collect a tax from the city as a whole for the purpose of paying these obligations unless that procedure is the only means by which payment can be made. Similarly, in my opinion, the council does not have authority to make appropriations from the general fund to meet these obligations.
REPORT OF THE ATTORNEY GENERAL

CITIES—Council—How vacancies filled in City of Norton.

PUBLIC OFFICERS—Vacancies—City Council—How filled in City of Norton.

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for City of Norton.

August 2, 1962

This is in reply to your letter of July 31, 1962, in which you state that one of the persons elected at the recent June election to membership on the City Council, effective September 1, 1962, is now deceased. You request by advice as to whether the term to which this person was elected should be filled by the voters at an election or whether the term should be filled by the City Council.

As you have pointed out, Section 3.4 and 3.5 of the Charter of the City of Norton provides as follows:

"3.4. The council shall be elected in the manner prescribed by law, as follows:

"The mayor and councilmen in office at the effective date of this act shall continue in office until the expiration of the term for which they were elected. At the regular municipal election to be held on the second Tuesday in June, 1954, and each four years thereafter, three councilmen shall be elected, each for a term of four years beginning on the first day of September, next following their election. At the regular municipal election to be held on the second Tuesday in June, 1956, and every four years thereafter, two councilmen shall be elected, each for a term of four years beginning on the first day of September, next following their election. Each councilman elected as hereinabove provided shall serve for the term stated or until his successors shall have been elected and qualified. The council shall be a continuing body, and no measure pending before such body shall abate or be discontinued by reason of expiration of the term of office or removal of any of its members. Provided, however, in the event membership of the council shall for any reason, be reduced to two or less members, the clerk of the council shall cause notice of such fact to be directed to the judge of the Circuit Court of Wise County, Virginia, who would, thereupon, order a special election to be held within 30 days, and all vacancies shall be filled for the unexpired term thereof at such election.

"3.5. All other vacancies shall be filled within thirty days, for the unexpired term, by majority vote of the remaining members of the council."

The vacancy for the term commencing September 1, 1962, will not occur until that date. The failure of a person who was elected to qualify on that date will create a vacancy with respect to that membership on the council. Section 3.5 of the City Charter requires the City Council, by a majority vote of the remaining members to fill the vacancy within thirty days. Section 15-401 of the Code is also applicable. This section provides that the person elected shall be "a qualified person to fill the vacancy for the unexpired term." The Charter section relating to the filling of a vacancy on the Council does not contain the language quoted from § 15-401, but, in my opinion, any person who is elected by the City Council to the office must meet the residence requirements of § 15-487 of the Code and Section 32 of the Constitution.
CITIES—Disbursement of Funds—What officers to sign checks.

HONORABLE A. O. LYNCH
Treasurer of Norfolk County

This is in reply to your letter of November 9, 1962, relating to the City of Chesapeake, in which you state as follows:

"We are in the process of designing the forms necessary for the function of the city and the question must be decided as to who shall sign checks on account of the City of Chesapeake:

1.—For expenditures authorized by the City Council
2.—For expenditures authorized by the City School Board
3.—For expenditures authorized by the Department of Public Welfare

For your information the city has organized a Department of Finance where all checks will actually be issued on orders from the three boards and all of the records of the city will be maintained at that office except those constituting the records of the Treasurer in so far as state funds are involved.

"We want to hold the number of required signatures to the minimum that will meet the requirements of law; therefore we shall appreciate it if you will advise us just who shall sign the checks as enumerated above."

The Charter of the City of Chesapeake (Chapter 211, Acts of 1962) does not make any specific provision with respect to who shall sign checks for disbursement of the city's funds. In my opinion, it would be appropriate and proper for the city council to pass a resolution requiring the city treasurer to sign all such checks upon vouchers issued by each of the departments. The ordinance or resolution could specify who should have authority to sign such vouchers. By reference to Section 8-03 of the Charter, you will find that the city treasurer shall perform such other duties as may be assigned by the Director of Finance or the council not inconsistent with the laws of the Commonwealth.

This is sufficient authority for the council to designate the treasurer as the paying officer.

CITIES—Leases—Authority of city to dispose of electrical facilities.

HONORABLE WILLIAM F. STONE
Member, State Senate

This is in reply to your letter of November 10, 1962, in which you pose several questions relating to a proposal which has been made to the Council of the City of Martinsville by a privately owned utility company, wherein the City would undertake a long-term lease of all the City-owned electrical facilities. The proposal contemplates the utility company taking over all City personnel now working in the Electrical Department of the City; the making of additions and improvements to the lines, installations, etc.; the payment to the City of a sum certain for the lease and franchise for a stated number of years; and a right in the City to take back such physical facilities installed by the public utility at the termination of the lease at a depreciated price.

You draw my attention to Article 2(16) of the charter for the City of Martinsville, which reads as follows:

"Powers of the City—(16) To acquire in the manner provided by
the general laws any existing water, gas or electric plant, works or system, or any part thereof. Any public utility owned or operated by the City of Martinsville, whether it be water, gas, electric plant or otherwise shall not be sold until the same shall have been first submitted to the qualified voters of the City at a general or special election and shall have been approved by two-thirds of such voters voting on the question of such sale, which two-thirds shall include the majority of qualified registered voters owning real estate in said City and voting in such election on such sale."

Your first two questions read as follows:

"(1) Would this not for all practical purposes be a delayed sale of the City owned public utilities—plant and equipment—since the City would not have the personnel or funds to again begin operation at the end of the lease agreement?

(2) Does the City Council have the power and authority to execute such a lease agreement without a vote of the citizens as required by the Charter or Court approved action?"

In general, a power to sell carries with it the power to perform all incidental acts. The Supreme Court of Appeals of Virginia has held that a power of attorney to sell land includes the power to exchange for other lands. See, Bukva v. Matthews, 149 Va. 500. In the strict sense of the word, a sale contemplates a transaction in which title is vested in the buyer. It is fairly well recognized, however, that "sale" is not a word of fixed and invariable meaning, but may be given a narrow or broad meaning according to the context of the surrounding circumstances.

We are not here concerned so much with the semantics of the word "sale" as we are with the construction of the language utilized by the Legislature in placing a limitation on a power granted the City of Martinsville. As utilized in the charter, I think it quite manifest that the language employed by the General Assembly was intended to restrict the City in disposing of public utilities until approved by two-thirds of the qualified voters, which two-thirds must include the majority of the qualified registered voters owning real estate. Having placed a limitation upon a power granted to the council of the municipality, I am of the opinion that such limitation must be construed so as to give meaning to the legislative intent if at all possible. It is, indeed, argued that a long-term lease of the physical plant, coupled with a transfer of all personnel and the franchise to operate the facilities would in effect be a conveyance, except for the retention of bare legal title. I should not think the General Assembly intended that the Council may accomplish indirectly that which it could not do directly.

While I am not certain that such a long-term lease would be construed by a court of competent jurisdiction as being tantamount to a sale, I am of the opinion that such a lease would be as effective as a sale for all practical purposes. Under such circumstances, I think it extremely doubtful that the City Council could legally execute such a lease as contemplated in your letter.

Your next inquiry reads as follows:

"(3) In the event that the City should execute such a lease agreement, would the employees now working in the City Electric Department lose their State retirement benefits by working for the privately operated utility Company?"

By virtue of Article 4, Chapter 3.2 of Title 51 of the Code of Virginia (1950), the officers and employees who are regularly employed full time on a salary basis by the political subdivisions of the Commonwealth are eligible to participate in the State retirement system. Section 51-111.43 of the Code provides that when membership ceases, except in the case of retirement, an employee shall thereafter
lose all rights to any retirement allowance benefits. Your third inquiry is, therefore, answered in the affirmative.

Your fourth inquiry reads as follows:

"(4) In the event the City should execute such a lease agreement, could the private utility cease operations of the City owned hydro-electric plant without a vote of the citizens approving same?"

I am of the opinion that your fourth inquiry should be answered in the affirmative. Unless the lease provides that the hydro-electric plant must be continued in operation, the company would not be obligated to do so.

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CITIES—Planning Commission—Two members may be appointed from governing body.

May 24, 1963

HONORABLE J. RANDOLPH LARRICK
City Attorney, City of Winchester

This is in reply to your letter of May 21, 1963, in which you request my interpretation of a portion of § 15-963 of the Code of Virginia (1950), as amended, which relates to the membership of local planning commissions. In so far as here material, § 15-963 of the Code reads as follows:

"A local planning commission, hereinafter sometimes referred to as local commission shall consist of not less than five nor more than fifteen members, appointed by the governing body, all of whom shall be residents of the county or municipality, and who shall be freeholders qualified by knowledge and experience to make decisions on questions of community growth and development. The local governing body may require each member of the commission to take an oath of office.

"One member of the Commission may be a member of the governing body of the county or municipality, and one member may be a member of the administrative branch of government of the county or municipality. * * *"

The foregoing quoted provision permits a total of two members who may be already serving on the governing body of the locality or in the administrative branch of government of the locality. One of the two may be appointed from the governing body, and one may be appointed from the administrative branch of government.

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CLERKS—Deputies—Residence requirement.

PUBLIC OFFICERS—Clerks—No authority to appoint deputy residing in another jurisdiction.

May 31, 1963

MISS LUCY A. ALLEN
Clerk of Circuit Court of Clarke County

This is in reply to your letter of May 30, 1963, in which you request my advice as to whether or not under §§ 15-487 and 15-487.1 of the Code you have the right to appoint a deputy clerk from the adjoining County of Frederick or
from the City of Winchester and, if so, whether or not that particular appointee could continue to live outside the County of Clarke while holding such office.

In this connection, I enclose copy of an opinion dated December 21, 1960 to Mr. John H. Powell, Clerk of Nansemond County, Virginia, which opinion is published in the Report of the Attorney General (1960-1961), p. 36. Your attention is especially directed to the last four paragraphs of this opinion. You will note that this office expressed doubt as to the constitutionality of § 15-487 to the extent that it would authorize the appointment of a deputy clerk who resides in another jurisdiction. This, of course, would also apply to § 15-487.1.

Section 32 of the Constitution reads as follows:

"Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided, in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience.

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

In the opinion of the Attorney General published in the Report of the Attorney General (1943-1944), pp. 76-83, referred to in the opinion to Mr. Powell, the Honorable Abram P. Staples, Attorney General at that time and later a Justice on the Supreme Court of Appeals of Virginia, stated: "... the language quoted (Section 32 of the Constitution) clearly requires every officer of the State, and of every county or city, to be a qualified voter and a resident thereof with two exceptions." One of these exceptions is that the General Assembly may have the power to alter this requirement as to officers elected by the people. This exception, of course, would not apply to a deputy clerk who is an appointive officer. The other exception, of course, would not apply.

In view of these opinions, I do not feel that a clerk has authority to appoint a deputy clerk who is a nonresident of a county in which he would perform official services incident to the clerk's office of a court of record.

CLERKS—Duties Imposed by Selective Service Act—No longer applicable.

WAR—World War II terminated.  

HONORABLE W. CARY CRISMOND  
Clerk of the Circuit Court of Spotsylvania County  
March 8, 1963

This is to acknowledge receipt of your letter of March 6, 1963, in which you state:

"Reference is made to page 268, Opinions of the Attorney General for the year 1950-1951, 'Selective Service Act' and advise if the duties imposed upon the clerks by the sections mentioned in your opinion are still in effect and should be complied with by the clerks?"

Treaties of peace were concluded with Italy, Bulgaria, Hungary and Rumania on February 10, 1947, United States Code Congressional Service 1947, 2321-2498.*  
A treaty of peace with Japan was signed on September 8, 1951. The war with
Germany was terminated by Joint Resolution of Congress No. 289, approved by the President October 19, 1951. (50 App. USCA, pages XIX-XXI). In view of this information, it would follow that World War II no longer continues. The duties of clerks under the provisions of § 17-88 of the Code of Virginia (1950) only extend to those instances where the list includes the residents of the county who have been inducted during the "continuance of the present World War II."

As World War II no longer continues, I am of the opinion that the provisions of that section are no longer applicable.

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CLERKS—Fees—Adoption proceedings—Limited to $10.00, even though two children involved.

HONORABLE EVA W. MAUPIN
Clerk of Circuit Court of Albemarle County

June 27, 1963

This is in reply to your letter of June 26, 1963, which reads as follows:

"I will appreciate your office passing on the following question:
"It has been set out the Clerk's fees allowed that for adoptions clerks are allowed to charge a fee of ten dollars; if there are two children (a sister and brother) being adopted by one set of papers, should the Clerks charge ten or twenty dollars?"

Section 14-124.1 of the Code provides as follows:

"Notwithstanding any other provision of law to the contrary, only one fee, which shall be in the amount of ten dollars, shall be required by the clerk to be paid by the petitioner or petitioners for all services rendered in an adoption proceeding."

It will be noted that under this section the clerk may require only one fee, which shall be in the amount of $10.00, to be paid by the petitioner or petitioners for all services rendered in an adoption proceeding.

In my opinion, whenever the petition for adoption relates to more than one person, it is, nevertheless, a single proceeding under this statute and the fee of the clerk in such cases is limited to $10.00.

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CLERKS—Fees—Collected from sale of hunting and fishing licenses.

GAME AND INLAND FISHERIES—License Fees—Agents appointed for collection.

HONORABLE CHARLES B. CROSS, JR.
Clerk, Circuit Court, City of Chesapeake

January 21, 1963

This is in reply to your letter of January 15, 1963, in which you request my opinion as to whether the license fees collected by you as agent of the Commission of Game and Inland Fisheries, pursuant to § 29-61 of the Code, are to be
considered as fees collected in your official capacity as Clerk, or whether they are to be handled as a separate individual account.

While it is true that there is no statutory obligation upon the clerk of the circuit court of a city to collect license fees imposed under Title 29 of the Code of Virginia, it nevertheless follows that any moneys paid into the clerk's office, even though he acts as an agent for the Game Commission, are considered as fees paid into that office. It is to be noted that § 14-145 of the Code requires every clerk of a court of record to file with the State Compensation Board a full statement showing all fees, allowances, commissions, salaries or other emolument of office, derived from the State or any political subdivision thereof, or from any other source whatever, collected or received by him during the year.

CLERKS—Fees—Condemnation proceedings—When to be paid by petitioner.

HIGHWAYS—Condemnation—Certificates of deposit—When petitioner to pay fees.

HONORABLE WILLIAM R. SHELTON
Clerk, Circuit Court of Chesterfield County

This is in reply to your letter of April 26, 1963, in which you enclosed a petition filed by counsel for the landowner which alleged that the landowner was not given notice of the filing of the certificate of deposit as required under § 33-70.3, Code of Virginia (1950), as amended, and in which the petitioner seeks to invalidate the certificate of deposit under § 33-70.7 of the Code. In addition to this, there is set forth in the petition a prayer that damages be awarded to the landowner because of the alleged failure to give notice of the recordation of the certificate.

I am of the opinion that the relief sought in the petition filed in this case is beyond that contemplated under §§ 33-70.6 and 33-70.7 of the Code, since it requests additional relief in the nature of damages which must be shown in the proper proceeding. Inasmuch as this matter is now before the court, I will make no comment upon the propriety of the action sought in the petition.

Section 33-70.8 of the Code provides in part:

"Notwithstanding any other law to the contrary, the clerk of the court wherein any such certificate is filed shall receive the following fees, and no other:

"(1) For the filing of any petition as provided in §§ 33-70.6, 33-70.7 and 33-70.11, the clerk shall be entitled to a fee of fifty cents to be paid by the petitioner."

Since the petition requests action beyond the amendment of the certificate of deposit and the withdrawal of funds, the fees provided by § 33-70.8 of the Code do not apply. I wish to point out that if the petition merely requested a withdrawal of the funds represented by the certificate of deposit, the costs would be paid by the petitioner in accordance with the fees set forth in § 33-70.8 of the Code.

I further am of the opinion that the fees to be charged by you in this instance should be the fee normally charged under § 14-124 of the Code.
REPORT OF THE ATTORNEY GENERAL

CLERKS—Recordation—Duty to docket judgment for alimony—Time for docketing.

June 24, 1963

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This will acknowledge receipt of your letter of June 21, 1963, in which you present the following question:

"When the court decrees a certain amount of money per week or month for the maintenance, support and education of children and for attorneys' fees and costs growing out of a divorce case, is it the duty of the clerk to docket in the judgment lien docket this decree for so much money per week or month for the support, maintenance and education of the children in addition to attorneys' fees and costs as soon as the decree becomes final, or is the proper procedure in this sort of case one in which a judgment should not be docketed until the defendant is in arrears in the payment of support money, attorneys' fees and costs, at which time the attorney would have to prove to the court just how much money is in arrears and the court thereupon would enter a judgment for the payments that are in arrears in addition to attorneys' fees and costs?"

Under § 8-373 of the Code the clerk is required to docket every judgment for money rendered in his court or office. In this connection, I enclose copies of two opinions: one dated October 31, 1950 to the Clerk of Courts of Bristol, published in the Report of the Attorney General (1950-1951), at p. 172, and the other dated January 12, 1953 to the Clerk of Fairfax County, published in the Report of the Attorney General (1952-1953), at p. 40. I am of the opinion that a judgment for alimony, maintenance, support and education is not excepted, unless the decree specifically provides that such payments shall not be a lien on the real estate.

If the decree in any such case designates the real estate on which the judgment shall be a lien, this information would necessarily have to show on the judgment lien docket.

Judgments under § 8-388, unlike other judgments, do not create a lien on real estate until and except from the time that an abstract of the judgment is duly docketed and indexed.

CLERKS—Recordation of Judgment Lien—Failure to record not a bar to marking judgment satisfied.

JUDGMENTS—Satisfied—Right of debtor to have judgment marked satisfied.

July 13, 1962

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This is in reply to your letter of July 11, 1962, which reads as follows:

"Civil judgments rendered in a County Court are held in that court for a period of six months, at which time they are filed with the Clerk of the Circuit Court, numbered and properly indexed, and either the
County Court or the Clerk of the Circuit Court can issue executions on these judgments for a period of two years, at the expiration of which time only the Clerk of the Circuit Court can issue an execution thereon.

"My question is this: After the original judgment from the County Court has been filed, numbered and indexed in the Clerk’s Office of the Circuit Court and has not been docketed in the Judgment Lien Docket, is it necessary for the plaintiff or his attorney, in the event that the plaintiff collects his judgment, to docket the judgment in the Judgment Lien Docket in order for the plaintiff to mark the judgment satisfied, or can he mark on the original judgment that is filed the fact that it has been satisfied in full?"

In my opinion, it is not necessary for judgments filed in your office under § 16.1-115 of the Code to be recorded in the Judgment Lien Docket in order for the judgment to be marked satisfied upon payment. The judgment may be marked satisfied by the judgment creditor or his attorney by making a notation to that effect on the papers that were received and filed pursuant to § 16.1-115. A judgment creditor in a county court has the right to obtain an abstract of his judgment and have it recorded in the Judgment Lien Docket so as to protect the lien against subsequent purchasers of the judgment debtor’s real property, but the failure of the judgment creditor to obtain and record the abstract can in no way affect the right of the judgment debtor to require that payment of the judgment be noted thereon by the judgment creditor or his attorney.

CLERKS—Recordation—Security Trust—When to be recorded.

HONORABLE W. L. PRIEUR, JR.
Clerk of Courts, City of Norfolk

December 17, 1962

This is in reply to your letter of December 14, 1962, which reads as follows:

"With reference to the enclosed statute which added a new section known as § 55-58.1 defining 'security trusts' and in which is included mortgages, I have this specific question: If a mortgagor, who may be a resident of Virginia, purchases personal property outside of the state, and the seller uses a mortgage form rather than a deed of trust or conditional sales contract, and the selling firm, or vendor, is made the mortgagee, am I proper in declining to record this type of instrument under the facts as set forth?"

During his term of office as Attorney General, the Honorable A. S. Harrison, Jr., had occasion to construe § 55-58.1 of the Code on several occasions. See, Report of Attorney General (1960-1961), pages 34, 35 and 106. It was the view of the then Attorney General that this section of the Code applies only to instruments such as deeds of trust, naming therein a trustee. I concur in that view.

In the case mentioned in your letter there appears to be no standard deed of trust, but only a chattel mortgage naming a mortgagor or mortgagee. In such cases I do not believe that § 55-58.1 of the Code applies. You are, therefore, at liberty to place such an instrument to record, provided it meets all other requirements of law for recordation.
COMMONWEALTH ATTORNEYS—Duty to Give Advice to Public Officials—
No duty to represent sanitation authority, but may be employed.

July 26, 1962

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This is in reply to your letter of July 24, 1962, which reads as follows:

"We are in the process of establishing a Sanitary District in Nelson County, for the purpose of financing and constructing a lagoon-type sewer system.

"There is considerable legal work involved in this matter, such as preparing petitions to the Court, Court orders, written opinions of the validity of the bonds, easements for the sewer line, a deed to the lagoon site and title examinations, and possibly some condemnation suits.

"I shall appreciate your opinion on the following questions: what part, if any, of the above legal work on the Sanitary District I am required to perform as a part of my duties as Commonwealth's Attorney of Nelson County? Will it be lawful for the Board of Supervisors to ask the Court to designate an attorney and fix his compensation, under Section 15-504 of the Code, to represent the Board of Supervisors in the setting up of his Sanitary District?

"In addition to your answers to the above questions, I should like to know what the general practice has been in Virginia, concerning compensation for work done by Commonwealth's Attorneys on Sanitary Districts."

Chapter 2 of Title 21 of the Code, pertaining to the establishment of sanitary districts, does not contain any provision relating to the duties of the Commonwealth's Attorney in connection therewith. However, it has been the opinion of this office for many years that it is the duty of the Commonwealth's Attorney to give legal advice and opinions to all public officials and boards of his county. Section 15-257 of the Code provides that:

" * * * The attorney for the Commonwealth shall be present at each and every meeting of the board and shall give his legal opinion when required by the board on all questions arising before the board."

Since you are not required to perform the other types of legal work mentioned in the second paragraph of your letter, I am of the opinion that the board of supervisors may employ an attorney, who may be the Commonwealth's Attorney, to perform these services pursuant to the following provision contained in § 15-504:

" * * * On application of the board of supervisors, board of public welfare, or school board, the circuit court may designate such attorney, who may be the attorney for the Commonwealth or judge of the county court, to represent either or all such boards in matters requiring the services of an attorney, such attorney so designated to be paid such compensation by the county or school board or by the board of public welfare, as requisite, as the court prescribes. * * * "

With respect to the last paragraph of your letter, we have no records in this office upon which to base a reply.
COMMONWEALTH ATTORNEYS—Duty to prosecute violations of ordinances on appeal.

October 8, 1962

HONORABLE G. EDMOND MASSIE
Chairman, Compensation Board

You and the other members of your Board recently conferred with me in regard to my letter of July 31, 1962, to the Honorable J. Vaughan Beale, Commonwealth’s Attorney for Southampton County, relating to the duties of a Commonwealth’s Attorney with respect to prosecution of violations of criminal ordinances on appeal to the circuit court of the county in which a city of the second class is located.

A similar question was presented to the late Abram P. Staples by the Commonwealth’s Attorney for Rockingham County and the City Attorney of Harrisonburg, Virginia. The opinion of Mr. Staples is dated December 27, 1937 and is published in the Report of the Attorney General (1937-1938), pp. 27 and 28. I am enclosing copy of this opinion. Section 4864, referred to in that opinion, is now § 19.1-156 of the Code of Virginia, 1950.

Subsequently, on February 11, 1950, a similar question was presented to this office by the Honorable C. G. Quesenbery, Judge of the Corporation Court of Waynesboro, Virginia. In response to this request, this office reaffirmed the position taken by Attorney General Staples. I am enclosing copy of this opinion and call attention to the fact that § 19-131, referred to therein, is now § 19.1-156 of the Code. This opinion was published in the Report of the Attorney General (1949-1950), p. 61.

The question was again presented by the Commonwealth’s Attorney of Rockingham County under date of February 19, 1954. At that time this office adhered to the previous rulings of this office in regard to this matter. I enclose copy of this opinion, which is published in the Report of the Attorney General (1953-1954), p. 36.

The Charter of the City of Franklin (Chapter 155, Acts of General Assembly, 1962), in Sections 14.01 and 14.02, relates to the Commonwealth’s Attorney and specifically provides that the Commonwealth’s Attorney for the County of Southampton shall be the Commonwealth’s Attorney for the City of Franklin and “shall exercise and have the same rights and privileges, perform the same duties, have the same jurisdiction and receive the same fees therefor in the city” as are exercised by the Commonwealth’s Attorney in the County of Southampton and “shall receive such compensation as is prescribed in the general law.”

The duties of the City Attorney of the City of Franklin are prescribed in Section 6.02 of the Charter, as follows:

“The head of the department of law shall be appointed by the council. He shall be an attorney at law licensed to practice under the laws of the Commonwealth. The city attorney shall be the chief legal advisor of the council, the city manager and of all departments, boards, commissions, and agencies of the city, including the school board, in all matters affecting the interests of the city. He shall represent the city in all civil proceedings. It shall be his duty to perform all services incident to his position as may be required by the laws of the Commonwealth, this charter, or by ordinance. He shall have general management and control of the department.”

At the request of yourself and the other members of the Board, I have reviewed this question and I do not feel that I would be justified in adopting a view contrary to that expressed in these opinions of my predecessors. The first opinion was rendered in 1937. It has been reaffirmed in two subsequent opinions. The General Assembly has met in regular session thirteen times since the first opinion was rendered, during which times it could have enacted legislation overruling the
opinion of the Attorney General. However, no legislation of this nature has been passed, which would indicate that the General Assembly is not in disagreement with the rulings of this office with respect to this particular question.

CONTRACTORS—Examination—Board may give written examination.

February 7, 1963

HONORABLE E. L. KUSTERER
Executive Secretary
State Registration Board for Contractors

This is in reply to your letter of February 6, 1963, in which you request my opinion as to the authority of the State Registration Board for Contractors to give written examinations to plumbing, heating and electrical contractors and other contractors to determine their qualifications for a certificate of registration, as contemplated in § 54-129 of the Code.

Any person requesting registration as a contractor, as defined in § 54-113 of the Code, may be required to take a written examination before the Board issues a certificate under § 54-129 of the Code. While a "written" examination is not expressly mentioned in § 54-129 of the Code, such a requirement is manifest when read in conjunction with § 54-1 of the Code, which reads, in part, as follows:

"Every State agency except the Board of Medical Examiners, the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors and the Board of Veterinary Examiners authorized at any time to conduct examinations of applicants for admission to practice or pursue any profession, vocation, trade, calling or art shall file a copy of each examination within a period of ten days after it is given with the Secretary of the Commonwealth where it shall be lodged and preserved for a period of at least one year as a public record accessible to any person desiring to examine it during usual business hours; * * * ."

CONTRACTORS—Examination—Not required in localities when registered with State Board.

COUNTIES, CITIES AND TOWNS—Contractors' License—No examination required if contractor holds certificate from State Board.

August 2, 1962

HONORABLE WALTER B. GENTRY
Treasurer for the City of Richmond

This is in reply to your letter of August 1, 1962, which reads as follows:

"I have been requested by two of our local electrical contractors to get an interpretation of the law as to the examination of electrical contractors who are doing less than $20,000 contracts even though they already hold a certificate of registration from the State Registration Board for Contractors.

"There is no doubt that they have the privilege of doing a $20,000 or more contract, but what I am interested in is whether the contractors can do a job of $20,000 or less without taking a further examination from the counties and cities in the State of Virginia."
Section 54-145.2 of the Code of Virginia (Chapter 522, Acts of Assembly of 1958) is applicable. Under this section the governing body of the counties, cities and towns within this State have the power and authority to adopt ordinances, not inconsistent with Chapter 7 of Title 54 of the Code of Virginia, requiring every person who engages in the business of electrical contracting to obtain a license and may give examinations for the purpose of determining their qualification to perform such work.

There is excepted from the provisions of this section those contractors who have successfully taken the examination given by the State Registration Board for Contractors and who hold a current license. Certificates showing that a person has satisfactorily passed the State Board’s examination are issued in the first instance under § 54-129 of the Code, subject to being renewed annually as provided by § 54-131. A person possessing such a certificate is exempt from further examination testing his qualification to perform the type of contracting covered by the certificate.

COUNTIES—Appropriations—Cannot supplement pay for special grand jury.

HONORABLE JOHN H. POWELL
Clerk of the Circuit Court of Nansemond County

March 25, 1963

This is to acknowledge receipt of your letter of March 21, 1963, in which you state in part:

"Where a Special Grand Jury has been empaneled for a specific inquiry, do you know of any section of the Code whereby the Board of Supervisors can supplement the rate of pay that is provided in Section 8-204?"

As you state in your letter, § 19.1-160 of the Code of Virginia (1950), as amended, provides for the payment to grand jurors on the same basis as allowed jurors in civil cases, and § 8-204 of the Code of Virginia (1950), as amended, provides that jurors shall receive five dollars per day and seven cents per mile for each mile of travel on each day of attendance, but the mileage shall not exceed four dollars per day. I can find no other statutes pertaining to the payment of grand jurors. There is no statute which would authorize a board of supervisors to supplement the pay of the members of the special grand jury.

I am, therefore, of the opinion that a board of supervisors has no authority to supplement the rate of pay for special grand jurors.

COUNTIES—Appropriations—General county funds may be used for industrial development.

HONORABLE J. PEYTON FARMER
Commonwealth’s Attorney of Caroline County

November 8, 1962

This will acknowledge receipt of your letter of November 2, 1962, which reads as follows:

"I am enclosing a copy of the by-laws of the Rappahannock Development Association. I would like your opinion as to the legality of our Board of Supervisors appropriating money to the Association. The governing bodies of the counties involved are being asked to make appropria-
tions on a pro rata basis according to population. The current suggested amount is ten cents per capita.

"The money received by the Association is to be used to pay the salary of an executive secretary and to maintain an office, all in accordance with the by-laws."

Article II of the Association Bylaws reads as follows:

"The objectives of this organization shall be to create a suitable industrial climate for existing and future industries of the area and to actively stimulate industrial growth and development."

In my opinion, the Rappahannock Development Association is the type of organization contemplated by § 15-12 of the Code of Virginia, as amended by Chapter 580, Acts of the General Assembly of 1962. In my opinion, a county may appropriate funds out of the general levy for the purpose stated in your letter, subject to the limitations set forth in said Code section.

COUNTIES—Appropriations—Industrial development.

February 14, 1963

HONORABLE C. H. DAVIDSON, JR.
Commonwealth’s Attorney for Rockbridge County

This is in reply to your letter of February 12, 1963, in which you request my opinion as to whether the Board of Supervisors of Rockbridge County can make a contribution to the Rockbridge County Industrial Development Foundation.

Section 15-12 of the Code of Virginia was amended by Chapter 580, Acts of Assembly of 1962, so as to confer upon counties the power to make appropriations for the purpose of "securing and promoting industrial development of such county." Under this section a county may make appropriations (within the limits therein set forth) to chambers of commerce or similar organizations for such purposes.

I am enclosing a copy of an opinion relative to this subject which was furnished to the Commonwealth’s Attorney for Caroline County on November 8, 1962.

If the Rockbridge County Industrial Development Foundation is the type of organization contemplated by § 15-12, I am of the opinion that the Board of Supervisors may make such appropriation within the limits prescribed by this section.

COUNTIES—Appropriations—Lifesaving and first aid crew—When § 15-16.1 applies.

January 10, 1963

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney of Montgomery County

This is in reply to your letter of January 9, 1963, in which you present the following question:

"Does the Board of Supervisors of the County have the authority to appropriate money for the wants and needs of what is known as 'The Christiansburg Life Saving & First Aid Crew' which is, in my opinion, a charitable institution or association and would come under Section 15-16 and 15-16.1 of the Virginia Code, being purely voluntary and also being an aid and assistance to the County Fire Department?"

At the time of the opinion to Mr. Stone, the Code section in question was applicable only to cities and towns, but it was amended by Chapter 225 of the Acts of 1960 so as to include counties.

If it is established that the Christiansburg Life Saving & First Aid Crew is, in fact, a charitable organization, it appears it would qualify for appropriations from the county under § 15-16 of the Code.

Counties coming within the classification set forth in § 15-16.1 may make appropriations to rescue and life saving organizations, even though they may not be charitable. I do not believe that Montgomery County comes within the classification mentioned in this section.

COUNTIES—Appropriations—No authority to participate in cost of airport.

March 4, 1963

HONORABLE WILLIAM C. FUGATE
Commonwealth's Attorney for Lee County

This is in reply to your letter of March 1, 1963, in which you present the following question:

"The Board of Supervisors of Lee County has directed me to give you the following specific facts for your opinion: they are as follows:

"(1) A private corporation has acquired realty in Lee County, Virginia, for the purpose of establishing an airport. The corporation proposes to convey the realty to the Town of Pennington Gap, an incorporated town located in Lee County. If the realty is conveyed to the town, can the Lee County Board of Supervisors contribute funds for the development of the Pennington Gap airport? The airport to be established within the county outside the limits of the town."

Subsequent to receiving your letter, this office discussed this matter with you by telephone to determine whether or not the county would participate in the establishment and operation of the airport pursuant to Article 2 of Chapter 3 of Title 5.

You advised that the town itself will operate and own the airport and that the county will not participate therein in accordance with said article. Under these circumstances, I am of the opinion that the county may not make a contribution out of county funds for the development of the airport.

I can find no statute which would authorize such an appropriation.

You will note that under § 5-39 of the Code the local authorities of any county, city or town to which Article 2 is applicable may annually appropriate or cause to be raised by taxation a sum sufficient to carry out the provisions of Article 2. One of the provisions of Article 2 is that a county, city or town may operate an airport by itself, or may operate it under a joint arrangement with another political subdivision. Since there is no agreement to the effect that the county would operate the airport along with the town, it would seem to me that it is not authorized to make the appropriation under § 5-39.

The other question presented in your letter will be answered by separate communication.
COUNTIES—Appropriations—No authority to aid art gallery.

June 20, 1963

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney of Montgomery County

This is in reply to your letter of June 20, 1963, in which you request my advice as to whether or not the board of supervisors may make an appropriation to the Palette Art Gallery, which is located in Montgomery County. This is a nonprofit, unincorporated business, established for the purpose of developing, giving an opportunity, aiding and encouraging Montgomery County citizens who have painting or art talent to endeavor to develop those talents. Included in the art gallery is a free workshop to aid those who show talent for fine arts and paintings. The gallery sells these works of art to the public on a commission basis.

In my opinion, § 15-12 of the Code does not authorize the board of supervisors to make an appropriation of this type. Neither do I feel that § 15-706 of the Code applies in cases like this. That section, in my opinion, contemplates that the works of art will be owned by the county.

COUNTIES—Appropriations—No mandatory duty to install street lights.

March 21, 1963

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney of King George County

This will acknowledge receipt of your letter of March 20, 1963, in which you state that a group of citizens from the unincorporated village of Fairview Beach, King George County, has requested the board of supervisors to install and maintain twenty-seven street lights for that village. As you point out, § 15-778 of the Code provides that the board of supervisors would have the right to contract and pay for this service. In this connection, I am enclosing copy of an opinion dated August 10, 1962, to the Honorable D. Carleton Mays, Commonwealth's Attorney for Dinwiddie County, which may be of interest to you.

You state that the board of supervisors is willing to provide fourteen of such lights, but does not feel that it can make a commitment for the remaining lights. You wish to know whether or not the property owners affected may make a separate contract with the power company for the installation and maintenance of the thirteen lights, the county assuming no obligation in connection therewith. You suggest that this would not be proper and question the legality of such an arrangement between the property owners and the power company.

While it is true that the installation and maintenance of street lights in a rural area is a proper function of the board of supervisors, nevertheless, there is no mandatory duty upon the board to provide such facilities. I can see no reason why the citizens in a community may not join in a contract with a private power company for this service. I agree with you that it would be inappropriate for the private citizens to enter into a joint venture with the county for a service of this nature.
COUNTIES—Building Code—When applicable within Federal areas.

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

October 22, 1962

This is in reply to your letter of October 2, 1962, which reads as follows:

"The building and electrical inspectors of Loudoun County have asked me to write you requesting your opinion as to whether or not the buildings on Dulles Airport, Government owned property, leased to private corporations for an indefinite period on which buildings are constructed with private funds, come within and under the jurisdiction of the building and electric codes of the county."

The extent to which State and local governments may exercise jurisdiction within a Federal area depends upon the nature of the jurisdiction exerted by the United States government within that area. The mere fact that the Federal government owns land in a state does not of itself preclude the application of state and local laws within that area. Within the area comprising Dulles International Airport, the United States has accepted concurrent jurisdiction as provided in § 7-19 of the Code of Virginia. Assuming that the enforcement of the building and electric codes of the counties do not hamper or unduly interfere with the operations of the United States government, I am of the opinion that such codes are applicable to the construction of buildings within that area by private corporations.

COUNTIES—Executive Secretaries—Effect of appointment upon clerk of the county.

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

April 25, 1963

This will acknowledge receipt of your letter of April 24, 1963, which reads as follows:

"I will appreciate it if your office will review the various sections of Title 15 of the Code dealing with the appointment of an Executive Secretary by a Board of Supervisors of a county, and inform me as follows:

"First: If the Board of Supervisors appoints an Executive Secretary, is the present Clerk of the County, who is ex-officio Clerk of the Board, automatically relieved of all of his duties in connection with the governing body or can the Board retain him as Clerk and assign specific duties to the Executive Secretary?

"Second: If an Executive Secretary is appointed and the present Clerk is automatically relieved of his duties as Clerk of the Board, is the Clerk of the county entitled to the salary provided for under Section 14-163.1 of the Code?

"Reference is made to the last paragraph of that section.

"Third: Please also review the Acts of 1962, Chapter 623, page 960 and following, which will become effective at a later date pertaining to the questions heretofore stated."
Section 15-551.8 of the Code provides as follows:

"Upon the appointment and qualification of the executive secretary authorized by § 15-551.1 the county clerk of such county shall be relieved of his duties in connection with the governing body and all of his such duties shall be imposed upon and performed by the executive secretary."

In my opinion, in the event the governing body of Nansemond County appoints an executive secretary, such secretary shall exercise all the powers and duties contained in § 15-551.3 of the Code and perform such other duties as may be imposed upon him by the governing body as provided in paragraph (14) of said section. Thereupon, the county clerk, pursuant to the provisions of § 15-551.8, shall be relieved of his duties in connection with the governing body.

The appointment of an executive secretary under § 15-551.1 will not, in my opinion, affect the compensation allowed the county clerk under the provisions of § 14-163.1 of the Code. The compensation prescribed in this section is fixed by statute within the scope of the minimum-maximum range established for the respective counties.

The appointment of an executive secretary, however, would affect the compensation of a county clerk provided for in §§ 15-238 and 33-160 of the Code, due to the fact that the duties for which the compensation is payable will be performed by the executive secretary.

In the event Title 15.1 becomes effective on July 1, 1964, without any amendments prior to that time that affect § 15.1-122, the foregoing opinion will be applicable to a situation where an executive secretary is appointed under Article 8, Chapter 2, Title 15.1.

COUNTIES—Land Acquisition—No authority to participate in “open-space land program.”

Honorable William J. Hassan
Commonwealth's Attorney for Arlington County

Pursuant to your request of June 6, 1963, I have reviewed the “Open-Space Land Program Guide,” published by the United States Housing and Home Finance Agency, with a view toward possible participation in such a program by the County of Arlington.

The essence of this program is the acquisition of land by governmental agencies in order to preserve the land for long-range urban development.

As suggested by you, I examined Chapter 19.1, Title 15 of the Code of Virginia to determine whether the “projects” authorized therein contemplate an undertaking such as visualized in the open-space land program.

Chapter 19.1 of Title 15 was enacted during the 1958 session of the General Assembly as Chapter 640, Acts of Assembly, and is commonly known as the “Public Finance Act of 1958.” The title to that Act clearly indicates that the purpose of the legislation was to revise and recodify the general laws relating to the issuance of bonds and other funded indebtedness of counties, cities and towns. I do not believe it was intended that the Act was to be construed as an extension of the powers vested in the localities to acquire land for purposes other than those to be financed by the issuance of bonds.

I have been unable to find any statutory authority for the County of Arlington to participate in the land acquisition program here contemplated.
COUNTIES—Land—Maximum property owned—Sanitary district.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Limitation on acreage to be owned by counties does not apply.

March 21, 1963

HONORABLE PHILIP LEE LOTZ
Commonwealth’s Attorney of Augusta County

This will acknowledge receipt of your letter of March 19, 1963, in which you state that the Board of Supervisors of Augusta County is considering the purchase of 545 acres of land for the purpose of increasing the water resources of the county so as to be able to furnish a sufficient supply of water in the future to industrial users and for residential purposes. You state as follows:

"The question naturally arises as to the authority of the Board of Supervisors to make this purchase, and to pay for it in a lump sum from general funds, which they can do, or perhaps to make a substantial payment towards the purchase price, with the remainder to be paid in deferred payments over a period of one or two years.

"The Board has adopted the resolution attached with reference to this problem.

"I would like to have your opinion as to the authority of Augusta County to make this purchase. . . ."

The resolution referred to is as follows:

"BE IT HEREBY RESOLVED by the Board of Supervisors of Augusta County, Virginia that it is deemed advisable to acquire from Mrs. Mary Margaret Berry a tract of land situated in Middle River District, Augusta County, Virginia, containing 545 acres more or less containing several springs for the purpose of providing a public water supply for the agricultural, residential, governmental, and industrial development of the County of Augusta; and fixes the value of said land at $100,000 to be paid from the County General Fund.

"BE IT FURTHER RESOLVED: That this transaction is subject to the approval of the Attorney General of Virginia, of the authority of this Board to conclude this purchase.

"The details and terms of this transaction are to be worked out between the Board of Supervisors and the owner upon written approval of the action by the Attorney General. Motion Carried unanimously."

In your letter you call attention to §15-688 of the Code, which appears in Chapter 21 of Title 15 of the Code relating to buildings and lands which may be acquired by a county for county purposes and which limits to twenty acres the amount of land that may be owned by a county of the classification of Augusta County. You also refer to §15-20.8 of the Code and to certain sections appearing in Title 21 of the Code relating to sanitary districts, being §§21-118 and 21-118.4.

Section 15-20.8 of the Code reads as follows:

"The governing body of every county and town is authorized to make expenditures from the county or town general fund in order to acquire land, participate in the construction of dams and perform all other necessary acts for the purpose of providing sources of public water supply for the agricultural, residential, governmental and industrial development of the county or town."

This section, as well as the sections appearing in Title 21 and Title 15, rela-
ting to the Virginia Water and Sewer Authorities Act, places no limitation upon the number of acres of land a county may acquire and hold for the purpose of establishing an adequate water supply. Section 15-20.8 is very broad in its terms, expressly providing that the governing body of every county is authorized to make expenditures from the county general fund in order to acquire land, participate in the construction of dams, and perform all other necessary acts for the purpose of providing sources of public water supply for agricultural, residential, governmental and industrial development of the county. As I have pointed out, there is no limitation prescribed in this section or the other sections which I have cited authorizing the establishment of an adequate water supply and, in my opinion, § 15-688 does not constitute a limitation upon the powers granted in these statutes. Section 15-688 is a statute appearing in Chapter 21 of Title 15, with respect to the courthouse and office buildings of a county and has no bearing upon the authority of the county governing body to meet the needs contemplated by § 15-20.8, Chapter 22.1 of Title 15, and Chapter 2 of Title 21. In my opinion, the board of supervisors clearly has the power to purchase the land in question for the purposes contemplated by the resolution.

With respect to the question of deferring payment over a period of one or two years, your attention is directed to Section 115(a) of the Constitution of Virginia. As you know, under this section a board of supervisors may not contract a debt except within the limitations prescribed therein and under §§ 15-250 and 15-251 of the Code. See American-LaFrance Industries vs. Arlington County, 164 Va.

COUNTIES—Magisterial Districts—How division to be described.

HONORABLE M. WATKINS BOOTH
Commonwealth’s Attorney of Dinwiddie County

November 15, 1962

This will acknowledge receipt of your letter of November 9, 1962, which reads as follows:

“You will recall that I called you from Dinwiddie several days ago with reference to the division of Namozine Magisterial District in Dinwiddie County.

“There is now pending before the Circuit Court of Dinwiddie County a petition requesting the division of this Magisterial District. The boundary of the new District will follow existing state roads which are hard surface in its entirety except for one large stream which flows into the Appomattox River, the river being the northern boundary of said District. Judge Mayes, who is hearing this matter has requested me to write you with reference to Sections 15-60 and 15-61 of the Code, which apparently require a metes and bounds description of the new District. Judge Mayes would like to have you advise him as to whether a boundary described as following these roads, giving the distances along said roads and the directions along which said line runs and the large stream which is a boundary of said District will comply sufficiently with the statute requirements, that the District be designated by metes and bounds.”

Section 15-60 of the Code is applicable in those instances where no contest arises under § 15-59, and the Court is of the opinion the matter may be safely and properly determined without the aid of a report filed by commissioners. Sections 15-61, 15-62 and 15-63 seem to apply in those cases in which commissioners are appointed. In both procedures the district, or districts, shall be desig-
nated by metes and bounds. In 11 C.J.S. under the heading of "Boundaries," it is stated (page 542) under "definitions" as follows:

"By metes in strictness may be understood the exact length of each line, and the exact quantity of land in square feet, rods or acres. Metes result from bounds; and where the latter are definitely fixed, there can be no question about the former."

"'Metes' and 'bounds' means the boundary lines, or limits of a tract."

"'Bounds' means 'the legal, imaginary line by which different parcels of land are divided.'" (11 C.J.S. 541.)

I am unable to find a definition by our Court of the phrase in question.

In light of the definition found in Corpus Juris Secundum, I doubt whether a description giving the distances along roads would be in compliance with the statute. Roads are frequently widened and otherwise altered, and, hence, a boundary so fixed would not necessarily be subject to identification.

This is a question that has not previously been the subject of an opinion by this office. In my opinion, a description by metes and bounds as above defined would be advisable.

COUNTIES—Ordinances—Imposing motor vehicle license tax under § 15-8—Not less than sixty days must elapse between introduction and adoption.

ORDINANCES—Counties—Motor vehicle license tax under § 15-8—Not less than sixty days must elapse between introduction and adoption.

April 4, 1963

HONORABLE W. A. HOWLETT
Treasurer of Carroll County

This is in reply to your letter of April 1, 1963, which reads as follows:

"I would like you opinion on the following: 'The Board of Supervisors of Carroll County last year passed an ordinance laying a $10.00 license strip on the motor vehicles of said county, to go on sale on March 15, 1963. Last month the Board rescinded the original order and set the fee for said vehicles at $5.00. The law as I understand it requires at least sixty days for the new ordinance to come into effect, which would put starting the sale of these tags off to May 15. Several taxpayers have been in this office requesting to buy these tags, now, while they are in town for the purpose of purchasing their state automobile licenses. I wonder if it would be illegal or improper to sell these tags on request or must I wait until May 15th?'"

The general powers of boards of supervisors are found in § 15-8, Code of Virginia (1950), as amended, and your attention is directed to the portions thereof which read, in part, as follows:

"No county governing body shall adopt or amend any ordinance imposing a * * * county motor vehicle license tax, * * * except under the conditions hereinafter set forth, and any such ordinance adopted without compliance with such conditions shall be void and of no effect:

"(a) Any such ordinance may only be introduced at a regular meeting of the board and may not be adopted prior to the second regular
meeting following introduction and only then if not less than sixty days have elapsed between introduction and adoption;

“(b) The proposed ordinance shall be published once a week for four successive weeks in a newspaper published in the county, or if there be none such, in a newspaper having general circulation in the county; and

“(c) The proposed ordinance shall be posted at the front door of the county courthouse and at each post office in the county.” (Italics supplied).

If I correctly interpret the facts from your letter, the ordinance setting the license fee at $5.00 was introduced at a regular meeting of the Board of Supervisors of Carroll County on March 15, 1963. Such ordinance may not be adopted or placed in operation without compliance with all other statutory conditions and only then if not less than sixty days have elapsed between such introduction and adoption. It is, therefore, my opinion that the ordinance, in any event, would be void and of no effect until the requisite sixty days have elapsed and you should wait until May 15, 1963, to place these county motor vehicle license tags on sale.

COUNTIES—Ordinances—No authority to enact criminal ordinance, such as contributing to the delinquency of a minor.

HONORABLE THOMAS O. LAWSON
Assistant Commonwealth’s Attorney for Fairfax County

January 3, 1963

This is in reply to your letter of December 19, 1962, in which you refer to § 15-10 of the Code, which is applicable to Fairfax County and present the following question:

“My question is can the County of Fairfax rely upon Section 15-10 in order to enact criminal ordinances such as contributing to the delinquency of a minor (18.1-14), petty larceny, concealment of merchandise (18.1-126), bad checks (6-129), etc.?”

You have referred to § 15-77.3 of the Code and state that its provisions would be applicable to your county, and, for that reason, you feel that your county could enact ordinances covering the subjects included in your question.

Section 15-77.3 is not a grant of power to a municipality unless such municipality has obtained a charter specifically incorporating the section in the charter by reference. An illustration of this procedure appears in the Charter of Manassas Park, (Chapter 216, Acts of 1962.)

Section 15-10 has been construed by this office to confer upon counties qualifying under that section the powers conferred upon cities under general law. The powers conferred in a charter are by special act as distinguished from general law.

Unless there is a general law authorizing cities to enact ordinances of the nature suggested by you, in my opinion, the County of Fairfax could not adopt a valid ordinance of such nature.
COUNTIES—Sanitary Districts—County may participate in cost to extent of services utilized by county.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—County may pay for services but not participate in cost.

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This is in reply to your letter of June 27, 1962, which reads as follows:

"Thank you for your letter of June 26th concerning the Lovingston Sanitary District.

"My understanding is that in your opinion Nelson County is not permitted, in any event, to pay out of its general funds any part of the original cost or maintenance of the proposed sewer system. In other words, even though it could be determined that one-fourth of the original cost of the system was incurred to construct the lines to serve the non-taxed county buildings, or that the use of the sewer lines by the county buildings made up one-fourth of the total use of the whole system, still Nelson County would not be permitted to pay one-fourth of the original cost of the sewer system, nor one-fourth of any maintenance costs, but could only pay for connecting charges and service fees.

"This point is very important to us in arranging to finance the cost of the system, and I will appreciate your confirming my understanding of the matter as set forth above, so that I will be absolutely certain in my advice to the Board of Supervisors."

In my opinion of June 26, I stated that—

" * * * There is no statute under which the governing body of a county may make expenditures from the general fund for the establishment and/or maintenance of a sanitary district. * * * "

Of course, the board of supervisors may pay out of the general fund the cost of the installation of necessary water and sewerage facilities located on the premises of any county-owned property, to the same extent as any private property owner would do in order to avail himself of the benefits of the project for which the sanitary district is created. This expense could perhaps equal one-fourth of the total cost envisioned by the board. Afterwards, as stated in my letter of June 26th, the governing body may pay out of the general fund at the rate fixed by the board for connection charges and service fees for property of the nature owned by the county.

Under § 21-119 a sanitary district is a special taxing district for the purposes for which it is created.

Section 21-113.3 authorizes a county having a population in excess of thirty thousand but not in excess of thirty five thousand to expend funds from the general county levy "to pay the costs for which taxes have been levied in anticipation of the collection of such taxes." Nelson County does not qualify as to population to come under this section. This section seems to leave no doubt that other counties may not pay such costs.
COUNTIES—Street Lights in Subdivisions—County may pay for lights—No authority to assess residents for service.

SUBDIVISIONS—Street Lights—No authority in counties to assess residents requesting service.

August 10, 1962

HONORABLE D. CARLETON MAYES
Commonwealth's Attorney for Dinwiddie County

This is in reply to your letter of August 9, 1962, which reads as follows:

"Subdivisions have been on the increase in Dinwiddie County for the last few years and the Board of Supervisors has been furnishing street lights for them. They continue to ask for more lights and the bill is increasing each month. I have been requested by the Board of Supervisors to seek the answers to the following questions from you:

1. Is it a proper function for the County to install street lights in subdivisions?
2. Is it also a proper function for the County to pay the light bills in the subdivisions?
3. Is it permissible for the County to pro-rate the bills for the lights and add it to the taxes of those who are receiving the benefits from it?"

Under the provisions of § 15-778 of the Code, the boards of supervisors of a county may, in their discretion, install and maintain suitable lights on the streets and highways in the villages and built-up portions of such counties, respectively, and pay the costs of such installation and maintenance out of the county fund. Therefore, the answer to questions 1 and 2 is in the affirmative.

With respect to your question 3, this office has held that inasmuch as there is no mandatory duty upon a board of supervisors to furnish such service, a charge may be made against the persons "requesting the same." (See Report of Attorney General, 1953-1954, p. 13). This conclusion, in my judgment, deserves reconsideration. It would seem that whenever a board of supervisors deems it advisable under this section of the Code to install and maintain street lights it results in a public service for which no assessments may be made in the absence of statutory authorization. The statute under consideration authorizes the expense incident to such service to be paid out of the county fund, which phrase, in my judgment, relates to the general fund of the county. There is no statute which authorizes a county to replenish the general county fund by exacting a charge for the service in question.

For the reasons stated, I am of the opinion that your third question must be answered in the negative.

COUNTIES, CITIES AND TOWNS—Acquisition of Property for Trash Dumps—No authority for county and town to enter joint venture.

September 20, 1962

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will acknowledge receipt of your letter of September 18, 1962, which reads as follows:

"Section 15-707 provides for the governing bodies to acquire by purchase, etc., lands necessary for the use of dumps for waste material."
Montgomery County, under the 1962 amendment, was permitted to enlarge their acreage to fifteen (15) acres for each district or a total of sixty (60) acres for the county.

"Is there any authority that would not permit the County of Montgomery from purchasing jointly with the Town of Cambria, Virginia, an acreage for the use of dumps for purposes set out in Section 15-707?"

"Will the law permit the governing body of any county purchasing a dump site jointly with a town located in that county? In other words, the governing body having an undivided interest in the whole, or does the law require the governing body of a county to purchase property for such use to have the deed made solely to them and they own the same in fee simple?"

With respect to the second paragraph of your letter, I know of no statute which would authorize a county to enter into such an agreement with a town. Sections 15-699 and 15-725 authorize a joint undertaking between counties and towns, but neither of these is applicable to the question involved here. The definition of "project" as contained in § 15-723, fails to include dumps for waste material. I do not believe that an incinerator, as used in § 15-724, would include a dump.

Sections 15-692.2 and 15-692.3 apply only to joint ownership of facilities for educational purposes.

This office has consistently taken the position that counties possess only those powers delegated to them by the General Assembly.

For the reasons stated, the answer to your first question in paragraph three of your letter is in the negative, and the answer to your second question is in the affirmative.

COUNTIES, CITIES AND TOWNS—Consolidation—Effect upon commissions previously appointed.

PUBLIC OFFICERS—Abolition of Office—Effect of consolidation of city and county upon existing commissions.

June 10, 1963

HONORABLE CHARLES H. SMITH
Director, Virginia Supplemental Retirement System

This will acknowledge your letter of June 6, 1963, relating to the Princess Anne-Virginia Beach Incinerator Commission. You enclosed copy of an opinion by Mr. George U. Vakos, City Attorney for the City of Virginia Beach, in which he expressed the view that his Commission is no longer in existence. You also enclosed copy of a legal memorandum of Mr. Bernard McCusty, Regional Attorney for the Department of Health, Education and Welfare, in which he raises some question as to the opinion expressed by the city attorney.

The Princess Anne-Virginia Beach Incinerator Commission was a corporation established by the General Assembly by an act approved March 13, 1942 and designated as Chapter 221 of the Acts of Assembly of 1942. It is stated in this act that the Commission "shall be composed of the members of the board of supervisors from Lynnhaven and Kempsville Magisterial districts of Princess Anne county, the treasurer of the said county, the mayor of the town of Virginia Beach, the chairman of the Health Committee of the town council of Virginia Beach and the treasurer of the town of Virginia Beach."

This act further provides: "The said Commission shall be a body corporate invested with the rights, powers and authority and charged with the duties set forth in this act."
Effective January 1, 1963, the county of Princess Anne ceased to exist on account of the fact that as of that date Princess Anne County and the city of Virginia Beach (the town of Virginia Beach having become a city of the second class subsequent to the enactment of Chapter 221, Acts of 1942) were consolidated into a new city known as Virginia Beach. The Act effectuating the consolidation and providing a charter for the new city of Virginia Beach is set forth in Chapter 147 of the Acts of 1962.

Upon the effective date of the consolidation the Magisterial Districts of Lynnhaven and Kempsville and the city of Virginia Beach, successor to the town of Virginia Beach, ceased to exist. Therefore, it is impossible under the provisions of Chapter 221 for the Commission created thereby to continue to exist. There is no provision in Chapter 147 of the Acts of 1962 which authorizes the appointment of commissioners to this commission. There are no members of the boards of supervisors or other officials of Princess Anne County since that date.

Although there is nothing contained in Chapter 147 of the Acts of 1962 expressly repealing Chapter 221 of the Acts of 1942, nevertheless, the power of the Princess Anne-Virginia Beach Incinerator Commission to operate is destroyed. I agree with the city attorney that the consolidation had the effect of rendering the Princess Anne-Virginia Beach Incinerator Commission incapable of functioning thereafter.

COUNTIES, CITIES AND TOWNS—Consolidation—Referendum—When question to be submitted to people.

Honorable John B. Cowles, Jr.
Commonwealth's Attorney for the City of Williamsburg and James City County

This will acknowledge receipt of your letter of May 22, 1963, in which you state that pursuant to resolutions of the Board of Supervisors of the County of James City and of the City Council of Williamsburg, a commission has been appointed for the purpose of considering and making a study of the question as to whether or not the county and city shall consolidate into a city to be known as Williamsburg. You direct attention to § 15-152.29 of the Code and, especially, to the first two sentences thereof, which read as follows:

"Notwithstanding any other provision of the laws of the Commonwealth, until the expiration of ninety days following the adjournment of the regular session of the General Assembly of Virginia of 1964; (a) no city or town shall institute any proceedings for the annexation of territory of any county; and (b) no county, city or town which has not heretofore [prior to June twenty-ninth, nineteen hundred and sixty-two] held a consolidation referendum shall consolidate with any other county, city or town; * * *"

Before a referendum can be held under the provisions of Article 4, Chapter 9, Title 15 of the Code, the governing bodies of the city and the county must agree upon the terms of the consolidation. See § 15-221. This agreement, after being executed by the political entities involved, together with a petition on behalf of each governing body, must be filed in the appropriate courts. The agreement must be published as prescribed by § 15-223. After publication of the agreement is completed, and certification of such publication has been filed, the judges of the courts having jurisdiction shall order a referendum to be held at the next regular November election, or on a day fixed in the order, to take a sense of the qualified voters on the question as to whether the agreement shall become effective. If a majority of those voters participating in the election in
each jurisdiction shall approve the agreement, it shall be effective from the date specified therein. Under the language of this statute, if the agreement had been made and a referendum had been held prior to the effective date of this statute, the consolidation could have gone into effect in accordance with the terms of the agreement. No referendum having been held, in my opinion, there can be no further referendum relating to the adoption of a consolidation agreement until ninety days after the adjournment of the regular session of the General Assembly in 1964. The procedure contemplated by the county and city in this instance, if the referendum should be in favor of the consolidation, would, it seems to me, be a consolidation with the effective date being fixed at a future date. After the election the consolidation would be irrevocable.

In my opinion, the essence of consolidation is the ratification of the agreement by the electorate and, consequently, the question may not be submitted to the voters in an election until after ninety days from the adjournment of the 1964 regular session of the General Assembly.

The statute in question is a part of Chapter 265 of the Acts of Assembly, 1962, and under Section 2 of this Chapter, the Virginia Advisory Legislative Council is directed to make a comprehensive study of the laws of the Commonwealth which deal with annexation and consolidation and to make such recommendations to the 1964 session of the General Assembly as it deems necessary or advisable with respect to any needed revisions of the laws dealing with urban expansion into suburban and rural areas. Agreements to consolidate, in my opinion, are suspended during such study.

COURTS—Costs—When Commonwealth liable for fees.

May 13, 1963

HONORABLE ALFRED E. H. RUTH
Business Manager
Department of Mental Hygiene and Hospitals

This is in reply to your letter of April 26, 1963, which reads as follows:

“The question has come up in several County Courts as to whether or not the Department of Mental Hygiene & Hospitals should pay the usual Court cost of $3.75 in civil actions on behalf of the Commonwealth. These cases involve suits for judgment against contractors or legally liable relatives to collect delinquent amounts owed for care, treatment and maintenance of patients in our mental hospitals, as provided under Sections 37-125.1 through 37-125.15 of the Code.

“There is also the question as to whether or not the Department should pay the usual Court costs when filing suits in Courts of Record. These costs now vary widely with the different courts and depending on the type of petition filed.

“We will appreciate your opinion on this matter.”

In previous opinions of this office, my predecessors have uniformly expressed the view that the Commonwealth is not liable for taxed costs in litigation. The question you have presented, however, raises the question of the requirement for the Commonwealth to advance the fees prescribed at the time of instituting a civil action in courts of record as well as in courts not of record. While such cases generally involve the collection of taxes due the Commonwealth, there is no appreciable difference when the action is instituted for the purpose of collecting other debts owed the Commonwealth.

Insofar as courts not of record are concerned, this office has consistently held that the only fee which must be advanced at the time of instituting a proceeding
on behalf of the Commonwealth is the twenty-five-cent fee prescribed by § 16.1-115 of the Code of Virginia. This fee eventually goes to the clerk of the circuit court who is a fee officer and who is entitled to such fee for filing the papers of the case after it has been decided in the court not of record. For a full discussion on this question I am enclosing a copy of a letter addressed to the Honorable J. Gordon Bennett, Auditor of Public Accounts, under date of September 16, 1960. This letter appears in the Report of the Attorney General (1960-1961), p. 83.

The reasons for exempting the Commonwealth from the payment of the fees specified in § 14-133 of the Code are not applicable to fees which are collected in advance of instituting civil actions in courts of record. While in no case should costs be taxed against the Commonwealth as an unsuccessful litigant, this does not exempt the Commonwealth from the payment of fees specified by statute to be paid to the clerk of the court of record as a condition precedent to the institution of a civil proceeding. The clerk's fee should be advanced, and in a case wherein there is judgment on behalf of the Commonwealth such fee should be included as a part of the costs to be taxed against the defendant as provided in §§ 14-175 and 14-195 of the Code.

As pointed out in the letter of September 16, 1960, to Mr. Bennett, the Commonwealth does not pay the fees prescribed in § 14-116 of the Code for services of sheriffs and sergeants due to the prohibition in § 14-82 of the Code of Virginia.

You are accordingly advised that a fee of twenty-five cents should be advanced at the time of instituting a civil action in a court not of record for the purpose of collecting a debt due the Department of Mental Hygiene and Hospitals. If judgment is entered for the Commonwealth, all costs should be taxed against the defendant as if the costs had actually been paid out of the State treasury. When such proceedings are instituted in courts of record, the clerk's fee should be advanced in the same manner as is done by other litigants, with the exception of the fee generally collected by the clerk for payment to the sheriff for service of process.

COURTS—Jurisdiction—Probate of wills—Place of residence determines.

April 5, 1963

HONORABLE LEWIS JONES, JR.
Commonwealth's Attorney for Middlesex County

This is in reply to your letter of March 22, 1963, in which you request my opinion as to the proper locality for the appointment of an administrator for an alien decedent who resided in a rooming house in the City of Richmond for many years, but died seized of real property situate in Middlesex County.

By virtue of § 64-114, Code of Virginia (1950), the court which would have jurisdiction to probate the will, if there were a will, is vested with the jurisdiction to hear and determine the right of administration of the estate of a person dying intestate. The jurisdiction for the probate of wills is set forth in § 64-72 of the Code. This section contemplates four distinct conditions, each of which would confer jurisdiction, and none of which depends upon legal domicile as distinguished from residence. If the decedent had a mansion house or known place of residence, the county or corporation wherein that place of residence was situate has jurisdiction to probate his will.

In the case presented, the decedent resided in a rooming house in the City of Richmond and frequented his cottage in Middlesex County on week-ends during the summer months.

In my opinion, the proper jurisdiction for the appointment of an administrator for the estate of this decedent is in the appropriate court in the City of Richmond.
You have consulted with this office with respect to two letters to you from Irene L. Pancoast, Judge, Juvenile and Domestic Relations Court of Alexandria, dated July 13, 1962 and July 26, 1962, respectively. You have requested my advice.

As I understand the matter, the question is whether or not a Juvenile and Domestic Relations Court is required to file the warrants mentioned in § 19.1-335 of the Code with a clerk of a court of record and in all other respects comply with this section. The mandates of this section are directed to every county court and every municipal court. This section is as follows:

"§ 19.1-335. Between the first and tenth day of each month every county court and every municipal court shall make return of the warrants in all criminal cases finally disposed of by such court in the preceding month. Every county court shall make such return to the clerk of the county, and every municipal court shall make such return to the clerk of the corporation court of the city, or if there be no corporation court, the circuit court of the city. Upon every such return shall be itemized the fine and costs, or costs, if there be no fine, imposed in each case, or other disposition thereof. Every such county court and municipal court shall, at the time of making said return, pay to the clerk to whom the return is made any fines and costs shown by the return to be due to the Commonwealth, for which the receiving clerk shall issue his receipt on the official form. When the judge of any county court or municipal court acquits the accused he shall certify the costs of the trial and to whom due; and if he returns judgment against the prosecutor for costs he shall so state."

The answer to the question is resolved by the definition of municipal court. Section 19.1-5 is, in part, as follows:

"In the construction of this title and of each section thereof, the rules of construction set forth in chapter 2 (§ 1-10 et seq.) of Title 1 of this Code shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly."

"The words 'court not of record,' 'county court' and 'municipal courts' as used in this title, unless otherwise clearly indicated by the context in which they appear, shall have the respective meanings assigned to them in chapter 1 (§ 16.1-1 et seq.) of Title 16.1 of this Code."

By reference to Chapter 1 of Title 16.1 of the Code and, specifically, to § 16.1-5, we find that the meaning of "municipal courts" is as follows:

"Whenever the words 'municipal courts' appear in this title they shall mean and include all courts in cities heretofore designated as municipal courts, civil courts, civil justice courts, police courts, civil and police courts, traffic courts, and all other city courts not of record however designated except juvenile and domestic relations courts and courts of limited jurisdiction authorized in chapter 5 (§ 16.1-70 et seq.) of this title."
You will note by applying the definitions set forth in §§ 19.1-5 and 16.1-5 that Juvenile and Domestic Relations Courts are not included within the term "municipal court."

Therefore, under strict interpretation of the statutes under consideration, it would appear that the requirements of § 19.1-335 do not expressly relate to Juvenile and Domestic Relations Courts. These sections, however, would not, in my opinion, prevent a Juvenile and Domestic Relations Court located in a city from filing the warrants mentioned in § 19.1-335 with the appropriate court clerk, in which event the court of record clerk who receives these papers would be entitled to the fees prescribed in § 19.1-337, as amended by Chapter 546 of the Acts of 1962.

COURTS NOT OF RECORD—§ 16.1-97 not applicable to criminal cases.

CRIMINAL PROCEDURE—§ 16.1-97 not applicable to criminal cases.

August 27, 1962

HONORABLE CHARLES H. WILSON
Commonwealth's Attorney for Nottoway County

This will acknowledge receipt of your letter of August 24, 1962, which reads as follows:

"If your office has heretofore rendered an opinion on the applicability of Section 16.1-97 of the Code of Virginia to criminal cases, I shall appreciate a copy thereof.

"If such opinion has not already been rendered please advise if after the expiration of 10 days, and prior to the expiration of 30 days, an accused who has been convicted in the County Court and did not appeal within 10 days may move for a new trial in the County Court."

The question presented has not heretofore been the subject of an opinion by this office.

Section 16.1-97 appears in Chapter 6 of Title 16.1, which relates to the venue, jurisdiction and procedure in civil matters. The jurisdiction and procedure relating to criminal matters are contained in Chapter 7 of that Title. I am of the opinion, therefore, that § 16.1-97 is not applicable to cases arising under the provisions of Chapter 7 of Title 16.1. This section applies solely to cases arising under Chapter 6 of Title 16.1.

COURTS NOT OF RECORD—Expenses—When to be borne by county.

May 6, 1963

HONORABLE CHARLES J. ROSS
Clerk, Board of Supervisors, Madison County

This will acknowledge receipt of your letter of May 3, 1963, in which you state that Mr. C. P. Miller, Jr., Assistant Comptroller, has issued a memorandum citing a ruling of this office to the effect that "postage, telephone service, post office box rent and night depository fees are not proper expenses of the State which are incurred by county and juvenile courts."

You present the following question:

"Will you please inform me whether or not such expenses as postage,
telephone service, post office rent and night depositories (banks) in view of sections 16.1-49 and 16.1-153 of the Code are proper expenses of governing bodies of counties."

In my opinion, those necessary expenses incident to the operation of the office of the county and juvenile courts, not specifically allocated to the State, must be borne by the locality. In this connection, I am enclosing copy of three opinions relating to this matter.

The expenses to be borne by the state are set forth in § 16.1-49 for county courts and § 16.1-153 for juvenile courts. Sections 16.1-48 and 16.1-152 relate to obligations of the counties with respect to these two courts.

Although the statute does not specifically itemize the expenses to be borne by the counties, it, of course, is the obligation of the county to pay the expenses mentioned in your letter.

COURTS NOT OF RECORD—Expenses—When to be borne by State.

HONORABLE SIDNEY C. DAY, JR.
State Comptroller

May 1, 1963

This will acknowledge receipt of your letter of April 29, 1963, in which you refer to §§ 16.1-49 and 16.1-153 of the Code, relating respectively to the obligation of the State to furnish certain books and supplies to county courts and Juvenile and Domestic Relations Courts.

You state:

"There is a question in our minds as to whether the above sections cover payment of expenses by the State for the following:

1—Postage
2—Telephone Service
3—Post Office Box Rent
4—Night Depositories (Banks)

We request that you review Sections 16.1-49 and 16.1-153 and inform us if the items specified above are proper charges against State funds."

You will find in the Report of Attorney General (1954-1955), p. 242, an opinion dated October 8, 1954 to the Commonwealth's Attorney of Orange County, in which the language of these sections as they appeared in Title 16 of the Code is discussed. In this opinion you will note it is stated:

"I think it is the generally accepted rule that the word 'supplies' when used in statutes of the nature under consideration, connotes pencils, paper, rubber bands, blanks, ink and articles of that description (as distinguished from equipment) required and constantly used in the operation of an office of the character under consideration here."

I also refer to two other opinions, dated June 4, 1957 [Reports of Attorney General (1956-1957), p. 75 to Hon. John H. Powell] and July 11, 1958 [Report of Attorney General (1958-1959), p. 85 to Hon. Valentine W. Southall], which cover the question of whether or not the State is responsible for telephone service. In both of these opinions the view is expressed that the telephone service expense is an obligation of the county.

In light of these opinions, it is my opinion that the items mentioned in your letter are not contemplated as obligations of the State in §§ 16.1-49 and 16.1-153.
In other words, I do not believe that postage is included within the term "supplies," nor that the telephone service, post office box rent and night depository fees are proper expenses of the State.

COURTS OF LIMITED JURISDICTION—Jurisdiction—May hold preliminary hearings in felony cases and convene commissions for commitment of mentally ill.

HONORABLE JOHN G. CORBOY
Judge of the Municipal Court of the Town of Vienna

October 31, 1962

This will reply to your letter of October 23, 1962, in which you request to be advised concerning the jurisdiction of the Municipal Court of the Town of Vienna to hold preliminary hearings in felony cases and to convene commissions for the commitment of the mentally-ill, pursuant to the provisions of § 37-61 et seq. of the Virginia Code.

The pertinent provisions of the charter of the Town of Vienna relating to the Municipal Court of the town are set forth in Section 7 of the town charter in the following language (Acts of Assembly, 1960, Chapter 221, p. 289):

"The town court shall be known as the Municipal Court of the Town of Vienna, and shall have original jurisdiction in the trial of all cases involving the violation of town ordinances, and in the collection of taxes or assessments, or other forms of debt owing to the town.

"Jurisdiction of the said Court in civil matters shall be as provided in Section 16.1-77 of the Code of Virginia, and in criminal matters as provided in Section 16.1-124 of the Code of Virginia." (Italics supplied).

The civil jurisdiction conferred upon certain courts by § 16.1-77 of the Virginia Code embraces, inter alia, "all jurisdiction, power and authority over any civil action or proceeding conferred upon any trial justice, civil justice, civil and police justice, or police justice under or by virtue of any provisions of the Code of Virginia." See, § 16.1-77(4) Code of Virginia (1950). Section 37-61 et seq. of the Virginia Code empowers "any trial justice" to convene a commission for the commission of persons within his jurisdiction who are alleged to be mentally-ill. I am, therefore, of the opinion that the judge of the Municipal Court of the Town of Vienna may also convene such commissions.

The criminal jurisdiction conferred upon certain courts by § 16.1-124 of the Virginia Code embraces, inter alia, such jurisdiction, exclusive or concurrent, as may be conferred upon them by general law, or by the provisions of municipal charters. See, § 16.1-124(4) Code of Virginia (1950) as amended. In this connection, § 16.1-127 of the Virginia Code prescribes that each court not of record having criminal jurisdiction "shall have power to conduct preliminary examinations of persons charged with crime within its jurisdiction in the manner prescribed in chapter 6 (§ 19.1-90 et seq.) of Title 19.1." I am, therefore, of the opinion that preliminary examinations in felony cases may be conducted by the Municipal Court of the Town of Vienna.
COURTS OF LIMITED JURISDICTION—Jurisdiction—To try warrants issued by Justice of the Peace of the county.

JUSTICE OF PEACE—Authority—Issuing warrants for violation of town ordinance.

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney of Prince William County

December 5, 1962

This is in reply to your letter of November 19, 1962, in which you request my advice as to whether a justice of the peace for the County of Prince William may issue warrants returnable to a court of limited jurisdiction established in the Town of Manassas Park pursuant to Section 7 of the Charter of the Town as enacted by Chapter 216, Acts of Assembly of 1962.

This section reads, in part, as follows:

"The police justice is hereby vested with all the power, authority and jurisdiction and charged with all the duties within and for the Town of Manassas Park, and for one mile beyond the corporate limits thereof as set forth in Chapter 5 of Title 16.1 of the 1950 Code of Virginia as amended and any amendments of the laws of the State respecting courts of limited jurisdiction referred to in said chapter shall also be considered amendments of this section of this charter if the same are applicable hereto."

The jurisdiction of such town court is limited to cases involving violations of town ordinances and cases instituted for the purpose of collecting town taxes and other debts due the town, except he may issue attachments, warrants and subpoenas returnable to the county court. See Chapter 5, Title 16.1 of the Code.

Section 39-4 of the Code relates to the jurisdiction of justices of the peace which, it will be observed, extends throughout the county and includes towns located in such county. This jurisdiction, however, in my opinion is confined to violations of State laws and does not extend to warrants for the violation of town ordinances.

I find that Attorney General Saunders (Report of the Attorney General, 1930-1931, p. 139) ruled that a justice of the peace of a county does not have authority to issue warrants for violation of a town ordinance. I do not believe that the language appearing in § 19.1-91 of the Code extends the jurisdiction to violation of town ordinances. Section 19.1-91 relates to violations of State laws, and has no application to ordinances of towns and, in my opinion, contains no language that would justify a reversal of the opinion of Attorney General Saunders.

COURTS OF RECORD—Secretarial Help—Board of Supervisors may appropriate funds.

BOARDS OF SUPERVISORS—Authority—To appropriate funds for secretarial help for court of record.

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

October 15, 1962

This is in reply to your letter of October 11, 1962, which reads as follows:

"I cannot find any provision in the law whereby counties and cities constituting a judicial circuit can furnish secretarial help to the Judge
of the Circuit Court. I believe there is an allowance of $300.00 that can be paid by the State.

"I would like your opinion as to whether or not there is any prohibition against counties and cities furnishing secretarial help to a Judge of the Circuit Court, and whether or not the governing bodies of the counties and cities constituting a judicial circuit may pay for secretarial help."

Item 73 of the Appropriation Act contains the following paragraph:

"It is further provided that out of this appropriation shall be paid the expenses necessarily incurred on official business by judges of circuit, city, and corporation and hustings courts, for postage, stationery, and clerk hire, not exceeding $300 a year for each judge."

I understand from the Comptroller's Office that this is the only item of State appropriation covering postage and incidental expenses of a judge of a court of record.

I find that Attorney General Staples issued two opinions touching upon this question, the first of which is dated March 27, 1940, addressed to the Commonwealth's Attorney of Suffolk and published in Report of the Attorney General (1939-1940), p. 137. The second opinion was addressed to the Commonwealth's Attorney of Louisa County, dated June 28, 1946, and published in the Report of the Attorney General (1945-1946), p. 11. I am enclosing copies of these two opinions.

In light of these opinions and the fact that the item of $300.00 contained in the Appropriation Act obviously is inadequate to meet the requirements of a judge of a court of record in procuring secretarial help, I am of the opinion that the board of supervisors may make an appropriation for such purpose.

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CRIMES—Burning With Intent to Injure Insurer—Automobile constitutes chattel.

Honorable Philip Lee Lotz
Commonwealth's Attorney for Augusta County

July 18, 1962

This is in reply to your letter of July 16, 1962, which reads as follows:

"I would like to have your opinion as to whether the deliberate burning of an automobile in order to collect fire insurance thereon falls within the provisions of Section 18.1-85, Code of Virginia of 1950, or under the provisions of Section 18.1-79, Code of Virginia of 1950.

"The reason for my request is that Section 18.1-79 uses the word 'personal property' which, of course, cover a motor vehicle while Section 18.1-85 uses the words 'goods or chattels'. The words 'personal property' and 'goods and chattels' are not generally considered to be synonymous.

"In the case I have under consideration proof of the burning with intent to injure the insurer will be relatively easy. At the same time
it might be very difficult to prove malice, since the automobile was set fire to by a second person with the connivance, consent and procurement of the owner."

In my opinion § 18.1-85 is applicable, in light of the statement that you feel proof of the burning with intent to injure the insured will be relatively easy.

I am of the further opinion that chattels, as used in this section, includes automobiles. There are numerous citations in Words and Phrases in support of the view that a chattel is an article of movable personal property. In Black's Law Dictionary, 3rd Edition, it is stated that "chattel" is "the name given to things which in law are deemed personal property" and that "chattels personal are movables only."

When an automobile is pledged as security to secure a debt, the mortgage is denominated a "chattel mortgage." Our Supreme Court has on several occasions referred to "chattel mortgages" on motor vehicles.

CRIMES—Concealed Weapon—County dog warden may carry without permit.

DOG LAWS—Dog Warden—May carry concealed weapon.

HONORABLE CHARLES H. WILSON
Commonwealth's Attorney for Nottoway County

March 11, 1963

This is in reply to your letter of February 28, 1963, in which you asked to be advised if the dog warden of Nottoway County is authorized to carry a concealed weapon without a special permit from the court.

Section 18.1-269 of the Code of Virginia (1950), as amended, prescribes the carrying of concealed weapons. The section is inapplicable to any police officer, sergeants, sheriffs, conservators of the peace, other than notaries public, rural mail carriers and, under certain circumstances, collecting officers.

Section 19.1-20 of the Code designates certain officers as conservators of the peace. This statutory designation is not all-inclusive, in my opinion, for a conservator of the peace is a common law office, first established by Acts of Parliament passed in the reign of Edward III. 1 Edward III, c. 16. A conservator of the peace is generally defined as one whose duty requires him to prevent, and arrest for, breaches of peace in his presence. For most purposes the term is synonymous with "peace officer." See, Jones v. State, (Tex.), 65 S. W. 92; Marcuchi v. N. & W. R. Co., (W. Va.), 94 S.E. 979.

This office has previously expressed the view that a game warden is a peace officer and, for purposes of enforcing the game and dog laws, is a conservator of the peace. See, Report of Attorney General (1955-1956), pp. 87, 93. I concur in that view.

A dog warden appointed for a county, pursuant to § 29-184.2, Code of Virginia, has the powers and duties of a game warden in the enforcement of the dog laws in the locality for which he is appointed.

In view of the foregoing, I am of the opinion that the dog warden of Nottoway County may carry a concealed weapon without the special permit from the court, as contemplated in § 18.1-269 of the Code.
CRIMES—Contributing to Delinquency—Responsibility of parent.

May 29, 1963

Honorable James L. Dennis
Regional Juvenile Probation Officer
Juvenile and Domestic Relations Court

This is to acknowledge receipt of your letter of May 27, 1963, in which you state in part:

"In your opinion can the parent of a child be convicted under Section 18.1-14 of the Code of Virginia, as amended for contributing to that child's delinquency, if said parent is involved in conduct that is in bad taste that merits a conviction on a felony or misdemeanor charge if said child was not a party to the misconduct, witness to said act or associated with it in any way and had no knowledge of said misconduct, felony or misdemeanor at the time the act was committed.

"Under the aforementioned section of the Code of Virginia I would also like to know if a parent leaves his or her child in another party's home, which would be adequate under proper behavior, and while away from said child behaves in bad taste, or commits a misdemeanor or felony, if the parent can in your opinion be convicted of contributing to the neglect and dependency of said child."

The pertinent provisions of § 18.1-14 are as follows:

"Any person eighteen years of age or older, including the parent of any child, who shall cause or encourage any child under the age of eighteen years to commit any misdemeanor, or who shall send or cause any such child to go into any place for an unlawful purpose, or who shall in any way subject any such child to vicious or immoral influence, or who shall induce, cause, encourage or contribute toward the dependency, neglect or delinquency of any such child, shall be guilty of a misdemeanor; * * *

Where the misdemeanor or felony is committed out of the presence of the child and without knowledge to the child, it would hardly be possible for the conduct of the parent to be of influence on the child; therefore, your first question is answered in the negative.

Of course, there could be instances where the parent is engaged in an occupation of notorious and infamous conduct carried on not in the presence of the child which would eventually influence the child and render the parent unfit for the child's custody. Whether such conduct actually contributes to the dependency, neglect or delinquency of the child must be determined by the facts and circumstances of each particular case. No definitive answer can be made to your second question.

CRIMES—Cursing or Being Drunk in Public—"Age of Discretion" varies with circumstances.

July 10, 1962

Honorable Julius Goodman
Commonwealth's Attorney for Montgomery County

This is to acknowledge receipt of your letter of July 6, 1962, in which you state, in part, as follows:

"I would appreciate you giving me an opinion as to what age does the 'age of discretion' start or please clarify Section 18.1-237
known as the profane swearing and drunkenness statute, which starts out as follows:

"If any person arrived at the age of discretion profanely curse or swear or get or be drunk in public he shall be deemed guilty of a misdemeanor * * * .'"

The term "age of discretion" is not susceptible of an exact definition. The facts and circumstances of each case must be considered in reaching a determination as to whether the defendant has reached an age when he would have the capacity to distinguish between right and wrong sufficiently to render one amenable and responsible for his acts.

I would assume that the rule in Virginia with respect to the capacity of an infant to be capable of contributory negligence in actions in tort would be a reasonable basis upon which to decide whether or not an infant has arrived at the age of discretion when charged with a violation of this section of the Code.

CRIMES—Larceny—Personal property pledged as security for loan.

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney of Appomattox County

March 11, 1963

This will acknowledge receipt of your letter of March 6, 1963, which reads as follows:

"On several occasions recently I have had facts to arise in our County in the following manner and I would appreciate it very much to have the advice of your office as a guide for us in future instances, should a similar problem arise: Mr. Jones goes to Mr. Smith for the purpose of borrowing $25.00; Jones offers two automobile tires and other personal property, all of the value of less than $50.00 as a pledge or security for the loan of $25.00; Smith accepts the articles of personal property to be held as security for the debt and makes the loan; there is no written evidence of the transaction but the facts are in dispute. When Smith is away from home, Jones returns to Smith's home and takes possession of the personal property that he has pledged and left as security for repayment of the loan. Can you tell me what offense, if any, Jones is guilty of?"

This would probably constitute the offense of petit larceny, and, therefore, § 18.1-101 would apply.

A discussion of what constitutes larceny is contained in C.J.S., Vol. 52, commencing on page 779. It would appear from the facts stated by you that the elements necessary to constitute larceny are present.

During the time the property is pledged and in the possession and custody of the lender of the money, such person is the owner as against the person who pledged the property. See Articles 13 and 14, 52 C.J.S., pages 810-811.

A good discussion of the essential elements of larceny is also contained in American Jurisprudence, Vol. 32, commencing at Article 10 on page 696.

I hope that these references will enable you to determine the proper method of procedure in such cases.
CRIMES—Reckless Driving and Manslaughter—When criminal negligence necessary.

MOTOR VEHICLES—Reckless Driving—Criminal negligence not required.

HONORABLE CHARLES G. STONE
Commonwealth’s Attorney for Fauquier County

May 22, 1963

This is to acknowledge receipt of your letter of May 20, 1963, in which you state in part:

"Has your office ever had occasion to render an opinion on the question of whether the same type or kind of criminal negligence is required to convict a motorist of reckless driving as our Court of Appeals has on various occasions required to convict a motorist of involuntary manslaughter?

"Code Section 46.1-189 provides that any person who drives a vehicle upon a highway recklessly, or at a speed in a manner so as to endanger life, limb or property of any person, shall be guilty of reckless driving. Section 46.1-190 then specifies twelve acts which are also declared to constitute reckless driving.

"However, our Appellate Court has frequently held that to convict a motorist of involuntary manslaughter, it is necessary to prove criminal negligence; that is, culpable or gross negligence indicating a callous disregard of human life. For illustration, see Bell vs. Commonwealth, 170 Va. 597, 195 S. E. 675.

"My question is, whether criminal negligence as above defined is necessary to convict of reckless driving under 46.1-189 or 190."

I am unable to find any opinions issued by this office concerning this precise question.

In the Bell case, supra, the Court pointed out that the defendant was not being tried for a violation of the motor vehicle laws and, therefore, the Commonwealth was not compelled to designate the specific charge upon which she intended to prosecute, the indictment being one for manslaughter in the terms of the statute (Code § 4865, now § 19.1-66), and the Commonwealth having filed a bill of particulars in which it was recited that the death resulted from the defendant’s violation of a number of the provisions of the motor vehicle laws. The criminal negligence therein defined obviously applies only in the prosecution for involuntary manslaughter.

The violation of an act enumerated in § 46.1-190 of the Code, as amended, constitutes reckless driving, regardless of the degree of negligence which may or may not have been committed. To sustain a conviction of reckless driving under § 46.1-189 of the said Code, the manner of operation of the motor vehicle must be such as to show that someone was endangered or that someone’s property was endangered; and, the same is not dependent on the degree of negligence committed.

I am therefore of the opinion that to convict on a charge of reckless driving under §§ 46.1-189 or 46.1-190 of the Code, it is not necessary to prove criminal negligence as that term is defined in the case of Bell v. Commonwealth, 170 Va. 597.
CRIMES—Sale of Toy Firearms—Not applicable to pistols used to shoot blanks.

HONORABLE EUGENE A. LINK
Commonwealth’s Attorney for the City of Danville

This is to acknowledge receipt of your letter of April 2, 1963, in which you state in part:

“The question has arisen as to whether the above section [18.1-347] of the Virginia Code 1950 as amended, would permit the sale by a sporting goods firm of blank pistols used as starting guns in track meets. As you know, this is a special pistol that shoots blanks to start the various events at high school and college track meets.

“I would like to have your opinion as to whether the blank starting pistol would be considered as a pistol or toy under the above mentioned statute.”

The offense is described in Section 18.1-347 of the Code of Virginia (1950), as amended, as follows:

“No person shall sell, barter, exchange, furnish, or dispose of by purchase, gift or in any other manner any toy gun, pistol, rifle or other toy firearm, if the same shall, by means of powder or other explosive, discharge blank or ball charges.” (Italics supplied).

What the statute condemns is the sale of toy firearms and not ordinary firearms. The special pistol, described by you, used to shoot blank charges is not a toy.

It is, therefore, my opinion that the sale of special pistols which shoot blank charges and used at track meets, et cetera, is not prohibited by said § 18.1-347 of the Code.

CRIMES—Sunday Closing Law—Construction of pipeline.

SUNDAY—Sunday Closing Law—Construction of pipeline.

HONORABLE A. A. RUCKER
Commonwealth’s Attorney for Bedford County

This is in reply to your letter of May 2, 1963, in which you request my opinion as to whether the construction of a pipeline projected into Bedford County from some other county would constitute a violation of § 18.1-358, Code of Virginia (1950), as amended, in the event the builder of the pipeline continues operation throughout the week, inclusive of Sundays.

Insofar as here germane, § 18.1-358 of the Code reads as follows:

“On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person to engage in work, labor or business or to employ others to engage in work, labor or business except in household or other work of necessity or charity * * * ”

Other than enumerating specific types of sales which would not be considered as work of necessity, the 1960 amendments to the “Sunday Closing Law” did not materially change the basic purpose of this statute. The amended law contains
the same general provisions against working or transacting business on Sunday except in household or other work of necessity or charity as were found in the old statute.

The Supreme Court of Appeals of Virginia has stated that "work of necessity" is not merely one of absolute or physical necessity but embraces as well all work reasonably essential to the economic, social or moral welfare of the people viewed in the light of the habits or customs of the age in which they live and of the community in which they reside. Whether the act or work done in a particular case is reasonably essential to the economic, social or moral welfare of the people is ordinarily a question of fact for the jury and not a question of law for the court. See, *Francisco v. Commonwealth*, 180 Va. 371.

In view of this pronouncement from our Court of Appeals, this office has been reluctant to rule whether a particular transaction does or does not constitute a work of necessity.

Under the circumstances of the case presented in your letter, it is conceivable that reasonable minds may differ as to whether the contemplated construction is reasonably essential to the economic, social or moral welfare of the people in the community. For this reason I am reluctant to state categorically as to whether this type of work would constitute a violation of § 18.1-358 of the Code.

The question of advisability of prosecuting in the event the builder of the pipeline in question should go ahead with the proposed construction on Sundays is a matter I must leave to the sound discretion of the local enforcement officials.

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**CRIMINAL PROCEDURE—Attorney's Fee—No provision for reimbursing acquitted defendant.**

**Miss Martha Bell Conway**
Secretary of the Commonwealth

June 20, 1963

This is in reply to your letter of June 25, 1963, in which you enclosed a letter from Dennis Hagy, Route 1, Box 162, Raven, Virginia. In this letter Mr. Hagy petitioned the Governor for aid in procuring money for the payment of attorney fees incurred by him in the case of *Commonwealth v. Dennis Hagy*. It appears that Mr. Hagy was acquitted of a felony charge.

There is no provision of law under which the Governor could comply with the request of Mr. Hagy.

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**CRIMINAL PROCEDURE—Bail—Bond for appeal when no bail previously granted.**

**Honorabe William C. Fugate**
Commonwealth's Attorney of Lee County

March 5, 1963

This will acknowledge receipt of your letter of March 1, 1963, in which you present the following question:

"(2) By an opinion rendered July 21, 1961, to the Honorable D. W. Murphy, Judge, Juvenile and Domestic Relations Court for Chesterfield County, it is stated as the opinion of the Attorney General that a Justice of the Peace does not have the authority to grant bail to a person who has filed an appeal under Section 16.1-132 of the Code unless he acts in the capacity of a Bail Commissioner. We use a bail bond in this
County bonding persons charged with a misdemeanor to appear for their trial before the County Court on a certain date and hour and which goes further and states as follows: 'and at any time or times to which the proceedings may be continued or further heard and before any Court, Judge or Justice thereafter having or holding any proceeding in connection with said charge.' We consider this a continuing bond; and after the defendant has appeared before the County Court, convicted and appeals, it is our desire to learn if he would have to have a new bail bond on the appeal."

Your question is distinguishable from the question considered in our opinion of July 21, 1961 to Judge Murphy. His question related to a case where no bail had been previously granted.

It seems clear from the provisions of § 19.1-128, relating to conditions of recognizances, that a justice of the peace, when granting bail under the three preceding sections, should include in the recognizance the statutory condition set out in § 19.1-128, which is the same condition contained in the bail form in use in your county.

CRIMINAL PROCEDURE—Confessions—No duty to furnish defense counsel with copy.

June 14, 1963

HONORABLE LEONARD F. JONES
Commonwealth's Attorney for Campbell County

This is to acknowledge receipt of your letter of June 11, 1963, in which you state in part:

"I would appreciate your opinion as to whether the Commonwealth can properly be required to furnish defense counsel a copy of a confession made by the defendant in a felony case."

This office has not issued an opinion on this subject since that contained in a letter to the Honorable Carter R. Allen, dated July 16, 1956 (Opinions of the Attorney General (1956-1957) p. 86). The case of Abdell v. Commonwealth, 173 Va. 458, referred to in said letter, expresses the view that the accused is not, as a matter of right, entitled to evidence which is in possession of the prosecution. The Court, on page 72, passing on this question, stated:

"In 14 American Jurisprudence, p. 915, this is said:

"'As a general rule the accused is not, as a matter of right, entitled to have evidence which is in possession of the prosecution for inspection before trial.' This, in our opinion, is the proper rule. A different rule would tend to subject the attorney for the Commonwealth to great annoyance, to the probable destruction or loss of material evidence, and to compel the Commonwealth not only to furnish the accused with a full bill of particulars, but to supply the accused with the physical evidence it intends to introduce upon the trial. Such a rule as is urged by accused would, in our opinion, subvert the whole system of criminal law.

"There is no merit in the assignments of error."

I am unable to find where the Supreme Court of Appeals of Virginia has altered or changed its position on this question.
REPORT OF THE ATTORNEY GENERAL

CRIMINAL PROCEDURE—Confessions—No duty upon officer to discuss evidence with defense counsel before preliminary hearing.

June 27, 1963

HONORABLE LEONARD F. JONES
Commonwealth's Attorney for Campbell County

This is to acknowledge receipt of your letter of June 25, 1963, making further inquiries concerning the rights of the accused, if any, to inspect important data (evidence) in possession of the Commonwealth, which the Commonwealth wishes to use as evidence against the accused. This question was the subject of my letter to you dated June 14, 1963.

I quote in part from your said letter:

"With further reference to this question, I would appreciate your opinion as to whether the trial contemplated here would include the preliminary hearing now required by statute. In other words, can the defendant by subpoena duces tecum require the officer who took the confession to produce the original or a copy thereof at the preliminary hearing. If this can be done, can he further call the officer as his witness or make him his witness on cross-examination, and require the officer to read the confession.

"Would your opinion be different if the original and all copies of the confession were held by the Commonwealth's Attorney?"

The statute providing for preliminary hearings in criminal cases is section 19.1-163.1 of the Code of Virginia (1950), as amended. That section reads as follows:

"No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to such hearing unless such hearing is waived in writing."

One purpose of this statute is to afford the accused the opportunity to combat the charge before the examining magistrate (now the county or municipal court). The accused has the right to produce before the hearing officer any evidence which is pertinent, material and admissible. The rule denying the accused the right to inspect evidence in possession of the prosecution as set forth by our Court of Appeals in the case of Abdell v. Commonwealth, 173 Va. 458, applies only to inspection of such evidence prior to the trial.

It is, therefore, my opinion that an accused may summon any witness he desires at the preliminary hearing, together with any document which can be properly identified by said witness. This would include the officer who obtained the confession from the accused. However, neither the officer nor any other prospective witness for the prosecution can be forced to discuss the evidence with the accused or his counsel before the preliminary hearing or before the trial, as the case may be.
physicians who examine prisoners being transferred from a jail to the State convict road force. This section reads as follows:

"When the Director shall require any prisoner, before being transferred from jail to the State convict road force, to be examined by a physician, the fee for such examination, which shall not exceed two dollars and fifty cents, in any case, shall be paid by the State in the manner provided by law for the payment of fees to physicians for attending prisoners in jail."

This section clearly provides that the physician's fee in such cases shall be paid by the State. The provision that the fee shall "be paid by the State in the manner provided by law for the payment of fees to physicians for attending prisoners in jail" does not, in my opinion, mean that the locality shall pay any part of the fee as in the case where the service is rendered under § 53-184.

In my opinion, Form 4 is the proper form on which to make claim to the Comptroller.

You state that the jail in Augusta County is operated as a consolidated jail, serving the courts in Augusta County, City of Buena Vista, City of Staunton and the City of Waynesboro, and further state as follows:

"Should I as Clerk of the Circuit Court of Augusta County accept the Comptroller Form 4 from any and all of the above mentioned courts and then report these claims to the Comptroller on Form 316 (which is a list of allowances against the Commonwealth other than to Witnesses and Jurors) at the end of that particular term of Court?

"At the end of a term of Court an order is entered by the Judge of the Circuit Court, in the Common Law Order Book setting out all accounts allowed and this in itself makes this matter an order in a Court of Record. I would like to know should this Court make such matters a matter of record in this Court when there are no cases, pleas, or any other records in this Court pertaining to these matters?

"This question comes about mainly because all examinations in question pertaining to jail prisoners who have been sentenced to the State Convict Road Force on charges of non-support, and non-support cases are tried in the lower Court, the Juvenile and Domestic Relations Court and are seldom, if ever, matters heard in the Court of Record."

In my opinion, the solution to your problem may be found in § 19.1-317 of the Code, commencing at the second sentence, as follows:

"* * * Any other expense incident to a proceeding in a criminal case which is payable out of the State treasury otherwise than under §§ 2-199, 19.1-311, 19.1-313 or 19.1-315 shall be certified by the court. If it be a judge of a court not of record exercising jurisdiction, it shall be certified by such judge to the circuit or corporation court before which he qualified, which court shall certify the same, if it appears to be correct, to the Comptroller. With the certificate of allowance there shall be transmitted to the Comptroller the vouchers on which it is made. The court, in passing upon any account for fees or expenses required to be certified by it under this section, before certifying the account, may in its discretion, require proof of the correctness of any item thereof, notwithstanding the affidavit of the party in whose favor such account is. In all cases the judge of a court not of record shall file with his account a copy of the warrant on which his proceedings were had."

The matter under consideration is an expense incident to a proceeding in a criminal case and may be certified by a court not of record to the Circuit or
Corporation Court before which he qualified. That court can then certify the matter to the Comptroller.

The matter is to some extent complicated, but I feel that it can be handled in the manner herein suggested.

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CRIMINAL PROCEDURE—Costs—Travel expense for transporting prisoners to hospital.

February 4, 1963

HONORABLE KENNETH P. ASBURY
Commonwealth’s Attorney for the County of Wise

This is in reply to your letter of February 1, 1963, in which you request my opinion as to the source of payment of travel expenses of a Deputy Sheriff which are incurred in transporting prisoners from the local jail to Southwestern State Hospital at Marion.

You are referred to § 19.1-236 of the Code of Virginia, 1950, as amended, which expressly provides that such expense is to be paid by the County whose court issued the order of commitment. The ultimate sentence in that section reads as follows:

"Any person whose care and custody is herein provided for shall be taken to and from the hospital to which he was committed by an officer of the penal institution having custody of him, or by the sheriff or sergeant of the county or corporation whose court issued the order of commitment, and the expenses incurred in such removals shall be paid by such penal institution, county or corporation."

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CRIMINAL PROCEDURE—Disposition of warrants.

CLERKS—Criminal Cases—Disposition of warrants.

January 2, 1963

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This will acknowledge receipt of your letter of December 12, 1962, enclosing a letter to you dated December 7, 1962, from Mrs. Frances B. Brown, in which she refers to §§ 19.1-335, 19.1-336 and 19.1-337, as amended from which I quote as follows:

"The Honorable John A. Snead, Judge of the Municipal Court of the City of Colonial Heights and I would like your advice regarding the final disposition of papers in criminal cases tried in the Municipal Court and amount of fee due the Clerk of the Circuit Court as provided in §§ 19.1-335, 19.1-336 and 19.1-337 (as amended) in the 1950 Code of Virginia.

"The Circuit Court of Colonial Heights was established February 1, 1961. Since that date only warrants in Commonwealth cases and the fee of $1.25 when collected in each have been forwarded by the
It appears that under the provisions of Chapter 546 of the 1962 Acts, paragraph (6), amending § 19.1-337, a $1.25 fee would be due the Circuit Court Clerk for filing and indexing all papers connected with any criminal action in the Municipal Court including cases tried on City Warrants.

The Municipal Court has for sometime taxed the fee of $1.25 as cost on City warrants and it has been paid into the City Treasury. The papers have not been forwarded to the Circuit Court nor has any part of the fee been paid to this Court.

Under the amendment to § 19.1-337, should City warrants in cases tried since June 29, 1962 (the effective date of the Act) also be indexed and filed in the Circuit Court Clerk's Office and the fee of $1.25 taxed thereon be paid to the Clerk of the Circuit Court rather than to the City? There appears to be nothing in the City Charter which authorizes this procedure but was the practice in the past.

What disposition should be made of the City warrants filed in the Municipal Court between the dates of February 1, 1961 and June 29, 1962 and the fees collected on warrants when the defendants were convicted?

Section 19.1-335 provides that between the first and tenth day of each month every municipal court shall make return of the warrants in all criminal cases finally disposed of by such court in the preceding month, which return shall be made to the clerk of the corporation court of the city in which the municipal court is located, or, if no corporation court, then to the clerk of the circuit court of the city wherein the municipal court is located. With these warrants the municipal court shall remit to the clerk of the court of record any fines and costs shown to be due the Commonwealth.

Section 19.1-336 was amended by Chapter 546, Acts of 1962, so as to require the clerk to preserve such warrants for twenty years. Prior to the amendment of § 19.1-337 (Chapter 546, Acts of 1962), the clerk of the court of record was entitled to a fee of $1.25 for his services under §§ 19.1-335 and 19.1-336 in connection with those warrants involving violations of State law. The amendment deleted the phase "as related to Commonwealth cases." We held in an opinion dated June 29, 1962, to the Clerk of Bedford County that the amendment to the sections mentioned above and the amendment to § 14-132(6) allow the clerks of courts of record a fee of $1.25 in connection with his services involving violations of local ordinances as well as those involving violations of State laws. I enclose a copy of that opinion, which appears at page 24 of the Report of the Attorney General (1961-1962).

In light of these amendments, I am of the opinion that since the effective date of the amendments referred to herein the municipal courts have been required to report warrants, involving violations of local ordinances, to the clerks of courts of record to the same extent as warrants for violations of State laws, and to collect and transmit to the clerk a fee of $1.25 for each warrant. Therefore, the answer to your first question is in the affirmative.

With respect to your second question, those warrants should be transmitted to the same clerk's office as required by § 19.1-335.

The clerk's fee for that period was only twenty-five cents, as prescribed in the last sentence of § 19.1-337 and paragraph (6) of § 14-132 prior to the amendments mentioned herein.
CRIMINAL PROCEDURE—Fine and Costs—When to be released.

April 19, 1963

HONORABLE C. M. GIBSON
Clerk of Circuit Court for City of Hampton

This will acknowledge receipt of your letter of April 18, 1963, in which you state that on March 12, 1957, a prisoner was committed to the State Farm on the following sentences and court costs:

<table>
<thead>
<tr>
<th>Forgery</th>
<th>six months</th>
<th>$31.00 court costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forgery</td>
<td>six months</td>
<td>27.50 court costs</td>
</tr>
<tr>
<td>Forgery</td>
<td>six months</td>
<td>33.50 court costs</td>
</tr>
<tr>
<td>Forgery</td>
<td>six months</td>
<td>76.24 court costs</td>
</tr>
</tbody>
</table>

You further state that you were subsequently advised by the officials of the State Farm that after the prisoner had served the twenty-four months on July 5, 1958, he was held in custody until December 20, 1958 for nonpayment of court costs, as provided in § 53-221 of the Code.

Recently, the prisoner came into your office and, discovering that the judgments for costs had not been released, paid the same. You request my advice as to whether or not this was a proper payment and whether or not, if it was not a proper payment, the prisoner would be entitled to a refund.

Section 53-221 specifically provides that a person confined at the State Farm, in case the fine and costs have not been previously paid, shall work out the fine and costs, or costs, as the case may be, but that such person may not be held for a period longer than six calendar months for the purpose of working out the costs and fine, or costs, if no fine, although the credit due shall not discharge the fine and costs, or costs, in full. This section further provides that, upon the discharge from custody, after working out the fine and costs, or the maximum of six calendar months, that the costs and fine shall thereupon be discharged in full and that the person in whose custody the prisoner shall be at the time of his release shall certify the fact that the prisoner has served his sentence for nonpayment of fine and costs, or costs, as the case may be, to the clerk of the court in whose office the judgment is docketed and that the clerk shall file the certificate with the papers in the case and shall endorse the fact of the discharge of the fine and costs, or costs, upon the margin of the judgment lien docket where the judgment is docketed.

In light of these statutory provisions, it is my opinion that the certificate required by § 53-221 should be filed in your office and that you should make the marginal release accordingly and refund to the prisoner the amount he has paid in satisfaction of the judgment.

CRIMINAL PROCEDURE—Fines—Collection by courts of limited jurisdiction.

COURTS OF LIMITED JURISDICTION—Fines—Procedure for collection.

October 18, 1962

HONORABLE LEE LOVETT
Trial Judge, Stephens City, Va.

This is to acknowledge receipt of your letter of September 27, 1962, in which you request my opinion on questions concerning the procedure relative to the collection of fines. I shall answer the same seriatim, quoting from your letter:
Question 1: “According to 19.1-338 in any misdemeanor case tried before a court not of record in which a fine is imposed on a defendant in addition to costs, upon failure to pay such fine and costs the defendant may be committed to jail until such fine and costs are paid.

“Under 19.1-334 limitations are placed on the length of time of confinement. How is this section to be reconciled with Section 19.1-338 which states that the defendant may be confined in jail until the fine and costs are paid?”

Answer: As you know, the establishment of the Police Court of the Town of Stephens City is authorized in the town charter. Chapter 229, Acts of 1948. That chapter provides, in part, as follows:

“All trials held in pursuance to this section shall be held and conducted as criminal cases are held and tried by the trial justice and State courts, and appeal be to the Circuit Court of Frederick County.”

It is further provided that all fines imposed by such court shall be collected by the trial officer and paid into the treasury of the town. This court is a “court of limited jurisdiction” and one to which the provisions of Chapter 5, Title 16.1 (§§ 16.1-70 through 16.1-75), Code of Virginia (1950), are applicable. Section 16.1-74, which was first inserted in the Virginia Code in 1956, provides:

“All provisions with respect to venue, process and order of publication, and procedure in county courts shall, except as otherwise provided, be applicable to all cases instituted and heard in such police courts, and all procedure in such courts shall conform as nearly as may be to the provisions of this title with respect to procedure in county courts.”

Section 19.1-5 defines the term “court” as used in Title 19.1 to include any court vested with appropriate jurisdiction under the Constitution and laws of the Commonwealth. Article VI of the Virginia Constitution provides that the judiciary department includes inferior courts as are hereinafter authorized or may be established by law. Obviously, the Police Court of Stephens City is such a court. Section 19.1-5, supra, also defines the term “courts not of record” to be the same as that term is defined in Chapter 1 (§ 16.1-5), Title 16.1, supra. It would follow, therefore, that § 19.1-338 is not applicable to the Police Court of Stephens City. However, I call your attention to § 19.1-332, which reads as follows:

“When a person is confined in jail by order of any court or judge until he pay a fine and costs of prosecution, or the costs when there is no fine, or under a capias pro fine, on application to the circuit court of the county or corporation court of the city where confined, or to the judge thereof in vacation, such court, or judge in vacation, as the case may be, if to such court or judge it shall appear proper, may order the person to be released from imprisonment without the payment of the fine and costs, or costs when there is no fine, and he shall not thereafter be imprisoned for failure to pay the fine and costs or costs in that case. But the attorney for the Commonwealth of the county or city shall have five days’ notice of such application.”

This section and § 19.1-334 should be considered together.

Section 19.1-334 sets forth certain limitations on confinement in jail when the defendant is confined for failure to pay a fine and costs, and it directs the jailor, without further order of the court, to release the prisoner “upon the expiration of the limitation above prescribed.”
I am of the opinion that where the defendant is committed to jail under § 19.1-328 for the nonpayment of fine and costs, he can be held in confinement no longer than the time prescribed in § 19.1-334.

**Question 2:** "The warrants issued in criminal matters remain in the town office and are not sent to the Clerk of the Circuit for recording. In order to issue a writ of fieri facias we would need a judgment on record for execution.

"Will you kindly advise us what other incorporated towns within a county do with their warrants and what procedure they follow in securing judgments for unpaid fines and costs so that writs of fieri facias may be issued."

I am enclosing a copy of an opinion relating to the collection of fines and costs imposed in police courts—that is, courts of limited jurisdiction. This opinion was furnished to the Clerk of Tazewell County and is published in the Report of the Attorney General (1960-1961), p. 133.

With respect to what procedure is followed generally by courts of limited jurisdiction throughout the State, I am not informed. Perhaps some information might be obtained from the Executive Secretary of the Virginia Municipal League, 905 Travelers Building, Richmond, Virginia.

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**CRIMINAL PROCEDURE—Preliminary Hearing.**

May 1, 1963

HONORABLE HORACE T. MORRISON
Commonwealth’s Attorney of King George County

This is to acknowledge receipt of your letter of April 24, 1963, in which you state:

"As you know, Code Section 19.1-163.1 provides that a person arrested on a charge of felony shall not be denied a preliminary hearing upon the question of probable cause.

"Prior to the enactment of this section in 1960, it was settled law in Virginia that if the county court judge failed to certify the case to the grand jury at the preliminary hearing, the Commonwealth Attorney could, nevertheless, send the matter on to the grand jury if he felt that probable cause existed.

"It is my understanding that this new code section referred to above does not change this procedural rule; provided the defendant has been given a preliminary hearing. It would appear to me that the principle set forth in the opinion of the Attorney General to the Commonwealth Attorney of Gloucester County dated April 25, 1962, at page 81, applies likewise to the question here presented."

Section 19.1-163.1 is as follows:

"No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to such hearing unless such hearing is waived in writing."
In the case of Snyder v. Commonwealth, 202 Va. 1009, the Court held that this section was not jurisdictional. In that case there was a preliminary hearing but the Municipal Judge had not passed on a motion made by the accused to dismiss, when the grand jury met and indicted the accused. There was no objection made by the accused to this procedure until after the final order of conviction was entered by the trial court. As pointed out in an opinion of this office, dated April 25, 1963, to the Commonwealth's Attorney of Gloucester County, this statute does not apply where a person (accused) is not under arrest on a charge of felony, the charge having been dismissed at the preliminary hearing. Therefore, the person may be indicted by a grand jury without the necessity of first arresting him and conducting a preliminary hearing on the charge.

From what you state, the county judge failed to certify the case after conducting the preliminary hearing, and thereafter the grand jury indicted. This being the situation, it cannot be said that the accused was denied a preliminary hearing.

I do not believe that the statute contemplates that the Commonwealth is precluded from prosecution if no certification is made by the county or municipal court.

CRIMINAL PROCEDURE—Search Warrant—Not issued for search of person.

Honorable George B. Dillard
Municipal Court Judge, City of Roanoke

May 9, 1963

This is to acknowledge receipt of your letter of May 6, 1963, in which you state, in part:

"Your opinion is respectfully sought, therefore, whether a search and seizure warrant may be issued, under Virginia law, upon probable cause, for the search of the person."

A search warrant may be issued only when there is filed an affidavit before the issuing officer relating facts constituting probable cause. Section 19.1-85, Code of Virginia (1950), as amended, and Zimmerman v. Bedford, 134 Va. 787. Generally speaking, search warrants are issued for the purpose of discovering property on or in described premises or places as an aid in the detection of crime and not issued for the purpose of searching a person. This office has held that there is no authority to search a person under a search warrant. (Report of the Attorney General (1954-1955) p. 211). However, a person who is present on the premises which are being searched under a proper warrant may be searched without a warrant of arrest if such person is suspected of concealing the subject matter of the search, or if there is cause to arrest such person without an arrest warrant.


In my opinion, your question must be answered in the negative.
CRIMINAL PROCEDURE—Search Warrant—When to be executed.

April 23, 1963

HONORABLE LEROY MORAN
Commonwealth's Attorney for the City of Roanoke

This is in reply to your letter of April 8, 1963, in which you request my opinion as to the period of time within which a search warrant must be executed following the time the same is issued.

As you know, there is no statute prescribing a limitation on a time within which a search warrant must be executed. The general rule which has been applied is to require execution of a search warrant within a "reasonable time." That which constitutes a "reasonable time" is a question of law to be determined in each case, according to the circumstances. Considering the nature of such a warrant and the purpose for which it is obtained, I am of the opinion that, absent some peculiar circumstances, a search warrant should be executed immediately after it is issued.

CRIMINAL PROCEDURE—Search Warrants—Authority to issue warrant to search person.

JUSTICE OF PEACE—Search Warrants—No authority to issue to search a person for stolen property.

January 2, 1963

HONORABLE E. R. HUBBARD
Justice of the Peace,
Wise, Virginia

This is in reply to your letter of December 29, 1962, in which you inquire as to your authority to issue a search warrant to search a person for stolen property.


CRIMINAL PROCEDURE—Writ of Capias Pro Fine—Who is responsible to commit defendant to jail.

October 9, 1962

HONORABLE W. E. HOGG
Judge, County Court of York County

This will acknowledge receipt of your letter of October 3, 1962, which reads as follows:

"York County does not have a jail.
"For several years York County has been using the jail at Hampton, Virginia and a few months ago the authorities refused to accept any more York County prisoners, so an arrangement was made with the authorities in Williamsburg to lock up York County prisoners there.
"Today I am informed that the Williamsburg authorities will not accept any more York County prisoners on a Capias Pro Fine unless
the sum is great enough for immediate transfer to the State Convict Road Force.

"Under these circumstances it appears to me that the only procedure for me to follow would be to issue the Capias Pro Fines and put them in a file in my office and file the criminal warrants in the office of the Circuit Court. Do you agree with this procedure by me?"

A writ of capias pro fine should be directed to the appropriate officer and, in my opinion, you would not be justified in adopting the procedure suggested in your letter. You should deliver the writ to the officer for execution. If a person is taken into custody by the officer under the writ, it then becomes the responsibility of the officer to commit the defendant to jail in default of the payment of the fine.

You have performed your duty under the statute when you deliver the writ to the officer.


Miss Lucy A. Allen
Clerk, Circuit Court of Clarke County

July 19, 1962

Your letter of July 17, 1962, in which you ask a series of questions, has been received. They will be answered in the same order in which you present them.

(1) May a deed of trust be properly released by marginal release by the holder in due course of a negotiable note or bond which has by proper endorsement been endorsed to the order of the person seeking to make the release?

ANSWER: Yes. If the note itself shows proper endorsement to the person who is making the release, that person may execute the release.

(2) May a deed of trust be properly released by a person who has the physical possession of the instrument secured by the deed of trust which is made payable to bearer at a certain bank, be properly released by marginal release by an officer of the bank where the instrument is made payable, and where the instrument is marked paid by the stamp of the said bank?

ANSWER: Yes, if the bank is the actual holder of the note. If the bank is simply the collecting agency and is not the owner of the note, then it should be released by the actual owner.

(3) Under the holding in the case of Waynesboro National Bank v. Smith, 151 Va. 481, where I am requested to make a marginal release by the bank referred to above in my question No. 2, should the Clerk determine who the "lien creditor" is?

ANSWER: If the lien creditor, by the release, certifies that he is the holder of the note, that should be sufficient, for your purposes, to make the release. This certification may be made either in the body of the release or after the signature of the person making the release.

(4) In your opinion, does the stamp "paid" made by a bank where a bearer instrument secured by a deed of trust is made payable, con-
stitute due cancellation under the terms and provisions of Sec. 55-66.3 of the 1950 Code of Virginia, as amended?

ANSWER: Yes. The cancellation of the original instrument by being stamped "Paid" is sufficient if the name of the bank is included in the stamp. If not, there should be a signed statement by an officer of the bank under the word "Paid." The cancellation of the instrument, as provided above, plus the release thereof on the margin, constitutes due cancellation.

(5) Is it necessary that the bearer or holder so indicate after his signature of release on the margin of the deed book where the deed of trust is recorded?

ANSWER: Yes. If the note is payable to bearer, it should be definitely stated that the person releasing is the holder thereof. If the note is made to an individual, and the individual named in the note makes the release, it is not necessary to have the word "holder" after the signature.

DEPOSITS AND DEPOSITORIES—Banks—§ 58-944 applicable to moneys received in capacity of paying agent.

PUBLIC FUNDS—Deposits—§ 58-944 applicable to moneys received in capacity of paying agent.

March 7, 1963

HONORABLE J. VAUGHAN BEALE
Commonwealth’s Attorney of Southampton County

This will acknowledge receipt of your letter of March 5, 1963, with which you enclosed copy of a letter from counsel for the Bank of Virginia expressing the opinion that §§ 58-944 and 58-945 of the Code of Virginia do not apply to monies received by a bank in the capacity of paying agent for maturing bonds.

This question was considered by this office on two occasions in response to inquiries from the Auditor of Public Accounts. I am enclosing copies of the opinions relating to these inquiries as follows: One opinion to L. McCarthy Downs, dated August 19, 1936, published in the Report of the Attorney General (1936-1937), p. 131; and one opinion to J. Gordon Bennett, dated May 22, 1950, published in the Report of the Attorney General (1949-1950), p. 74.

These opinions, you will note, are contrary to the view expressed by counsel for the Bank of Virginia. This office sees no reason for modifying the opinions which are enclosed herewith.

DEPOSITS AND DEPOSITORIES—Time Deposits—Public funds not to be invested beyond statutory limits.

February 26, 1963

HONORABLE F. B. HUBER
Treasurer of Campbell County

This is in reply to your letter of February 21, 1963, which reads, in part, as follows:

"Section 2-299 of the Code of Virginia appears to permit fiscal officers of the Commonwealth to place public funds on time deposit with banks,
but limits such deposits to a period not exceeding six months. On the other hand, Section 58-943.2 allows county finance boards to authorize such deposits without limit as to time.

"I would appreciate your opinion as to whether I may place proceeds from bond sales and other county funds on time deposit for a period longer than six months."

With respect to your first question, relating to §§ 2-299 and 58-943.2 of the Code, it is my opinion that § 2-299 places a limitation upon the provisions of § 58-943.2. Section 2-299 was enacted by the General Assembly in 1958 and § 58-943.2 was enacted in 1954. Section 2-299 is, therefore, the most recent expression of the General Assembly with respect to this matter. In this connection, I am enclosing copy of an opinion dated April 2, 1962 to Honorable C. A. Sinclair, Treasurer of Prince William County, and I call your specific attention to the last paragraph of that opinion.

This conclusion is applicable to all county funds except proceeds of the sale of bonds under Chapters 19.1 and 19.2 of Title 15 of the Code. Under §§ 15-666.48 and 15-666.73, investment of these funds in time deposits may be for twenty-four months.

With respect to your second question, relating to §§ 2-298 and 26-40 of the Code, I am of the opinion that you are not permitted to invest public funds of the county in shares of building and loan associations and federal savings and loan associations. Under § 2-297(5) of the Code, public funds may be invested in savings accounts or time deposits of any bank within the State, subject to the proviso contained therein. However, this office has previously held that savings and loan associations, both federal and State, are not banks within the scope of this section. Moreover, in my opinion, when § 2-298 was enacted, subsection (25) of § 26-40 was deliberately omitted.

Therefore, you are correct in assuming that a county treasurer may not invest public funds in shares in such building and loan associations.

DIVORCE—Validity of Mexican divorce.

WITNESSES—Fees—Appearance before grand jury.

HONORABLE HODGES S. BOSWELL
Clerk of the Circuit Court of Nottoway County

This is to acknowledge receipt of your letter of May 4, 1963, in which you request my opinion on two questions which will be answered seriatim. I quote from your letter:

"Will you please advise if a Mexican divorce is valid in the State of Virginia?"

Without a statement of all the facts and circumstances surrounding the divorce; that is, how it was obtained, et cetera, it would be impossible to give a definitive answer to this question. An expression of an opinion by this office on such a question would not be binding on any of the parties. I can find no recorded case where our Supreme Court of Appeals has ever expressed an opinion on the validity of a divorce obtained in the courts of the Republic of Mexico. I would assume the court would be guided by the general principles pertaining to the recognition of foreign divorces, considering, among other things, whether the parties were bona fide residents of Mexico and legally domiciled therein, whether the divorce was obtained by fraud, whether the recognition of the foreign divorce would be in violation of the public policy of this State. You will find a
comprehensive discussion on these topics in 6 M. J., Divorce and Alimony, Sections 83 to 87, inclusive.

This office has previously ruled that there is no duty upon the clerk of a court to ascertain the relationship of parties applying for a marriage license, and that it is not "incumbent upon the clerk of the court to investigate the legal effect of divorces granted" in other jurisdictions. See, Report of the Attorney General (1941-1942) pp. 90, 91; cf., Report of the Attorney General (1938-1939) p. 163.

Further quoting from your letter:

"What is the witness fee for a Doctor testifying before a grand jury?"

Section 14-186 of the Code of Virginia (1950) prescribes that all witnesses summoned before a grand jury shall receive fifty cents per day for each day of attendance, plus necessary ferriage and tolls, and seven cents per mile over five miles, going and returning to the place where the grand jury meets. I am unable to find any statute which would authorize paying doctors a greater fee for appearing before a grand jury.

DOG LAWS—License Fees—Special fund—Not affected by employment of county dog warden except for amount formerly due State.

July 31, 1962

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This is in reply to your letter of July 27, 1962, which reads as follows:

"Where the Board of Supervisors of a county has by ordinance employed a Dog Warden, who has been appointed by the Judge of the Circuit Court pursuant to Section 29-184.2 of the Code of Virginia, is it permissible under new Section 29-184.6 for the County Treasurer to carry the dog license tax in the General County Fund or does he still have to follow Section 29-206 and keep these taxes in a separate fund?"

Section 29-184.6 of the Code was enacted for the purpose of allowing counties which had elected to employ a county dog warden under § 29-184.2 or § 29-184.3 of the Code to retain the 15% ordinarily payable to the State under § 29-206. This section does not affect the special fund provisions of § 29-209.

DOG LAWS—Licenses—Board of Supervisors may not fix compensation of agents to issue dog licenses.

COUNTIES—Compensation of Agents to Issue Dog Licenses—No authority in board of supervisors to fix.

September 20, 1962

HONORABLE LEONARD F. JONES
Commonwealth’s Attorney for Campbell County.

This is in reply to your letter of September 18, 1962, which reads as follows:

"Section 29-188 of the Code of Virginia provides that the Treasurer of a county may appoint agents to issue dog licenses and collect the tax."
"I would appreciate your opinion as to whether the Board of Supervisors may fix the compensation of these agents and pay them from the Dog Tax Fund or General Operating Fund."

The agents appointed by a treasurer of a county under § 29-188 may, in my opinion, be compensated in such amounts as may be allowed as an expense of the office by the State Compensation Board. I am not familiar with any statute under which a board of supervisors is authorized to compensate the county treasurer for his services except under the procedure provided in Article 8, Chapter 1, Title 4 of the Code.

I have discussed this matter with the office of the Auditor of Public Accounts, and we concluded that whenever a treasurer of a county decides to establish substations under § 29-188, he should first take the matter up with the State Compensation Board and obtain its approval of the expense to be incurred thereby.

Section 29-209 of the Code provides for the disposition of the dog fund, and nothing is contained in this section which would authorize the use of any part of that fund for the purpose under consideration here. The county's portion of any such expense that may be approved by the State Compensation Board would be payable out of the general fund of the county.

DOG LAWS—Licenses—Who to collect when city has tax collector.

TREASURERS—Dog Licenses—No duty to collect when city has tax collector.

Honorable Walter B. Gentry
Treasurer, City of Richmond

July 10, 1962

This is in reply to your letter of July 9, 1962, which reads as follows:

"I have had several calls recently from our sporting goods people here in reference to the collection of dog licenses. It seems that during our recent Legislature, according to Section 29-188, that this duty falls on the treasurer of the city or county. However, it seems to be somewhat misleading as to whether we shall collect it or the collector for the City of Richmond.

"I would appreciate it if you would give me your opinion on this matter."

By reference to Section 8.05 of the Charter of the City of Richmond, I find that it provides for a bureau of collection, headed by the collector of city taxes, whose duty is to collect and receive all moneys due the city for taxes.

Section 29-188 of the Code provides that any person may obtain a dog license by making application to the treasurer of the county or city in which such person resides, accompanied by the amount of the license tax, whereupon the treasurer may issue a dog licence tag.

The word "treasurer," as used in Chapter 9 of Title 29 of the Code, which includes § 29-188, is defined to include the treasurer of the county or city, as the case may be, or other officer designated by law to collect taxes in such county or city. Furthermore, § 29-188 specifically provides that "the treasurer or other officer charged with the duty of issuing dog licenses shall only have authority, etc. * * *," which language further supports the view that the treasurer of the city is not necessarily the officer who will issue dog licenses.

It is my opinion, therefore, that the duties in this regard fall upon the city tax collector rather than the city treasurer.
DOG LAWS—Ordinances—Authority of county to require vaccination against rabies.

ORDINANCES—Dog Vaccination—Who to perform vaccination.

May 27, 1963

HONORABLE W. EARLE CRANK
Commonwealth’s Attorney of Louisa County

This will acknowledge receipt of your letter of May 23, 1963, enclosing a proposed ordinance requiring the vaccination of dogs against rabies. An ordinance of this nature may, in my opinion, be promulgated by the governing body of a county under the provisions of §§ 29-195 and 29-196 of the Code. The ordinance, which is a model ordinance prepared by the State Department of Health, requires that all dogs over four months of age, shall be vaccinated by a licensed veterinarian. You state that this provision requiring the vaccination to be performed by a licensed veterinarian has been questioned upon the ground that it is unconstitutional. It is my opinion that the board of supervisors, under the provisions of the statutes cited and also under the provisions of § 15-8(2) of the Code, may adopt and enforce an ordinance of this nature.

With respect to the suggestion that there be included in the proposed ordinance a provision to the effect that “any such dog, licensed under a kennel license, may be vaccinated by any qualified person,” I think there is some question as to the legality of the proposed provision. In my opinion, the provision is vague and indefinite and, for that reason, could well be unconstitutional.

The phrase “any qualified person” is one about which there could be a difference of opinion as to its meaning. In this connection, your attention is called to Booth v. Commonwealth, 197 Va. 177, in which our Supreme Court held that the phrase “improper person” was unconstitutional on account of its vagueness and indefiniteness.

DOG LAWS—Poultry Killer—Dog may be killed when caught in act of killing poultry.

GAME AND INLAND FISHERIES—Dogs Killing Poultry—May be killed when caught in the act.

October 22, 1962

HONORABLE JULIUS GOODMAN
Commonwealth’s Attorney for Montgomery County

This is in reply to your letter of October 10, 1962, which has further reference to your letter of February 12, 1962, pertaining to poultry killing dogs.

In my letter to you, under date of February 27, 1962, I advised that under § 29-197 of the Code, the game warden or other officer could not destroy a poultry killing dog unless ordered to do so by the governing body of a county upon a finding that the dog is a confirmed poultry killer, having killed poultry for the third time.

I did not intend the conclusion reached in that letter to be construed as the exclusive method for coping with poultry killers. Section 29-197 of the Code also provides for the summary killing of a dog by any person finding a dog committing any of the depredations mentioned in that section. One of such depredations is the killing of poultry. Of interest in the construction of this statute by the Supreme Court of Appeals in the case of Willeroy v. Commonwealth,
181 Va. 779 (1943), in which the statute was held to contemplate the summary destruction of a dog which threatened poultry. The language of the court is worthy of repeating here:

"When Rover ran across the lawn and charged against this chicken-wire fence, with every prospect of breaking it down, we can see the fluttering terror of these pent-up pullets. We have a depredation mentioned in the statute. The danger was imminent, for this fence was made to keep chickens in and not dogs out. This dog was caught in flagrante delicto. Willeroy did not have to wait until it had bit a hen. * * *

I am of the opinion that any person, whether the poultry owner or not, may kill on sight any dog actually caught in the act of killing poultry. This remedy is separate and distinct from that affording judicial determination of a dog's proclivity toward poultry killing, or the poultry owner's right to compensation under § 29-202 of the Code.

DOG LAWS—Poultry Killer—When damages may be paid by board of supervisors.

COUNTIES—Authority to Pay Damage For Poultry Killed by Dogs—When § 29-202 applicable.

August 27, 1962

HONORABLE JOHN R. SNODDY, JR.
Commonwealth's Attorney for Buckingham County

This will acknowledge receipt of your letter of August 24, 1962, which reads as follows:

"A citizen of Buckingham County has presented a claim to the County Board of Supervisors for 399 chickens alleged to have been smothered to death after being frightened and stampeded by a stray dog. The Game Warden investigated this matter and reported that he found fresh tracks of a dog around the chicken house and possibly against it. However, no one saw a dog bothering or frightening the chickens.

"As you know, the pertinent language of § 29-202 of the Code of Virginia, as amended, is as follows, 'any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation therefor a reasonable value of such livestock or poultry.' I would like your opinion as to the responsibility of the Buckingham County Board of Supervisors in such a situation and your opinion as to whether or not there is liability under the above set of facts."

The question to be determined by the board of supervisors (in addition to the value of the poultry) is whether or not the dog's actions were the direct cause of the death of the poultry. If the board finds that the suffocation of the chickens was caused by a dog that was not owned by the owner of the chickens, the board would be justified in paying compensation for the damage.

I enclose copy of an opinion relating to this matter. This opinion is published in the Report of the Attorney General (1953-1954), p. 58.
ELECTIONS—Absentee Ballots—Candidates prohibited from notarizing or witnessing ballot.

May 28, 1963

HONORABLE E. R. HUBBARD, JR.
Justice of the Peace
Wise, Virginia

This is in reply to your letter of May 24, 1963, in which you state that you are a candidate for reelection to the office of justice of the peace in the Gladeville Magisterial District of Wise County, in the election to be held in November, 1963. You request my advice as to whether or not it is proper for you to notarize the coupon provided in § 24-333 in connection with an absentee ballot. In my opinion, this procedure is prohibited by § 24-335 of the Code, which reads as follows:

"Any notary or other officer above mentioned, who is a candidate for nomination or for any office, who shall so witness or certify the ballot of any such absent voter, to be cast at the same election at which such notary or other officer is to be voted for, shall be guilty of a misdemeanor."

Under § 24-334, a justice of the peace is an officer who may execute the coupon mentioned above, unless prohibited by § 24-335.

Although your name is not on the ballot for the other magisterial districts in Wise County, nevertheless, I feel that under § 24-335 you would be prevented from witnessing the signing of the voucher as required by § 24-332 and from executing the coupon as required by § 24-333 in connection with any absentee ballot cast in the election in either of the magisterial districts in Wise County.

ELECTIONS—Absentee Ballots—Last day for filing applications.

September 10, 1962

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of September 7, 1962, which reads as follows:

"The enclosed letter has been received from Mr. Stuart S. Rothwell, general registrar for the City of Charlottesville, in which he asked my advice as to the procedure he shall follow in posting the list required under Section 24-330 of the Code.

"You will recall that Section 24-321 was amended at the 1962 session of the General Assembly changing the time in applying for an absentee ballot from eight to five days. However, Section 24-330 was not changed in anyway. Therefore, when an applicant does not apply until the fifth day, which is generally the case, I can readily understand how it makes it difficult for the registrar to comply with the laws as set out in Section 24-330.

"In view of this conflict I would like you to advise me in this matter. When you render your opinion, please return Mr. Rothwell's letter to me."

As you point out, prior to the 1962 session of the General Assembly, § 24-321 required applications for absentee ballots to be filed not later than eight days prior to an election. This section, however, was amended so as to permit such ap-
APPLICATIONS TO BE FILED NOT LATER THAN FIVE DAYS PRIOR TO AN ELECTION. SECTION 24-330 REQUIRING A REGISTRAR TO MAKE OUT A LIST OF APPLICANTS FOR ABSENTEE BALLOTS IN DUPLICATE AND FILE ONE COPY WITH THE ELECTORAL BOARD AND ONE COPY WITH THE CLERK OF THE COURT AT LEAST FIVE DAYS BEFORE THE ELECTION WAS NOT AMENDED.

IT IS OBVIOUS, THEREFORE, THAT THE REGISTRARS WILL BE UNABLE TO COMPLY WITH § 24-330, DUE TO THE FACT THAT THEY WILL NOT BE ABLE TO MAKE UP THE LIST UNTIL THE END OF THE LAST DAY ON WHICH THE APPLICATIONS MAY BE FILED. THEREFORE, IN MY OPINION, THE REGISTRARS SHOULD FILE THE LIST REQUIRED BY § 24-330 AT LEAST FOUR DAYS BEFORE THE ELECTION IS TO BE HELD. THIS FEATURE OF THE LAW DOES NOT HAVE ANY EFFECT ON THE RESULT OF AN ELECTION.

ELECTIONS—BALLOTS—EXPENSE OF PRINTING.

PUBLIC OFFICERS—COMPATIBILITY—REGISTRAR—NOT TO BE ELECTED MAYOR.

JOHN Y. HUTCHESON, ESQUIRE
SECRETARY OF ELECTORAL BOARD OF MECKLENBURG COUNTY

MAY 14, 1963

THIS IS IN REPPLY TO YOUR LETTER OF MAY 9, 1963, WHICH READS AS FOLLOWS:

"WE HAVE TWO CANDIDATES IN THE JUNE ELECTION FOR MAYOR OF ONE OF OUR TOWNS. THE BALLOTS HAVE BEEN PRINTED SHOWING THEIR NAMES AS SUCH. ONE OF THESE CANDIDATES HAS BEEN REGISTRAR OF ELECTION FOR THAT TOWN FOR SEVERAL YEARS. HE RESIGNED YESTERDAY AND HIS SUCCESSOR WAS APPOINTED BY THE ELECTORAL BOARD AND QUALIFIED TODAY.

"I HAVE BEEN REQUESTED TO WRITE YOU FOR A RULING AS TO WHETHER THE EX-REGISTRAR IS A PROPER CANDIDATE, AND IF NOT, SHOULD THE BALLOTS BE REPRINTED LEAVING OFF HIS NAME. IF THIS IS DONE COULD THE VOTERS WRITE HIS NAME IN ON THE BALLOT? THIS QUESTION HAS BEEN RAISED BEFORE US BY VIRTUE OF CODE SECTION 24-66. IF IT IS NECESSARY TO REPRINT THE BALLOTS, WHO SHOULD PAY FOR THEM?"

SECTION 24-66 OF THE CODE PREVENTS ANY PERSON WHO HAS ACTED AS REGISTRAR FROM HOLDING AN OFFICE TO BE FILLED BY AN ELECTION BY THE PEOPLE AT THE ELECTION TO BE HELD NEXT AFTER HE HAS SO ACTED AS REGISTRAR. THIS SECTION WOULD PREVENT THE CANDIDATE WHO HAS RESIGNED ON MAY 8 FROM BEING ELIGIBLE TO QUALIFY FOR THE OFFICE FOR WHICH HE IS A CANDIDATE IN CASE HE SHOULD BE ELECTED. AT LEAST, THAT IS THE OPINION THAT HAS BEEN EXPRESSED ON SEVERAL OCCASIONS BY THIS OFFICE.

I AM ENCLOSING HEREWITH COPIES OF SOME OF THESE OPINIONS, WHICH ARE PUBLISHED IN THE REPORTS OF THE ATTORNEY GENERAL AS FOLLOWS:

OPINION TO MR. H. E. THOMPSON
PUBLISHED IN REPORT OF ATTORNEY GENERAL (1930-1931), AT P. 49

OPINION TO GOV. JAMES H. PRICE
PUBLISHED IN REPORT OF ATTORNEY GENERAL (1938-1939), AT P. 218

OPINION TO HON. E. W. CHELF
PUBLISHED IN REPORT OF ATTORNEY GENERAL (1950-1951), AT P. 106

OPINION TO HON. W. B. BLANDFORD
PUBLISHED IN REPORT OF ATTORNEY GENERAL (1951-1952), AT P. 70

YOU WILL NOTE THAT § 24-66 DOES NOT DISQUALIFY SUCH A PERSON FROM FILING FOR THE OFFICE AND HAVING HIS NAME ON THE BALLOT, NOR WOULD IT PREVENT ANY VOTER FROM
voting for this person by the write-in method in case his name would not be on the ballot. In case this person who has acted as registrar should receive a majority vote, the question then would be whether or not he could qualify for the office in light of the provisions of § 24-66.

With respect to your last question, if a new set of ballots should be printed the expense would have to be borne in the same manner as when the original ballots were printed.

ELECTIONS—Bond Referendum—Qualified voters—Cannot exclude non-freeholders.

April 23, 1963

HONORABLE GEORGE W. VAKOS
City Attorney for City of Virginia Beach

This will acknowledge receipt of your letter of April 18, 1963, in which you state that the City of Virginia Beach proposes to have a bond issue election for the purpose of submitting to the voters of the city the question of issuing $4,500,000 in bonds. You call attention to § 15-666.77 of the Code of Virginia, which was enacted by Chapter 563 of the Acts of 1962, and request my advice as to whether or not this has any effect upon the voter requirements in the proposed bond issue election. This section of the Code was obviously enacted in anticipation of the adoption by the voters of a proposed amendment to Section 30 of the Constitution, as set out in Chapter 258 of the Acts of 1962.

The proposed amendment to Section 30 would have authorized the General Assembly to require in every referendum upon the issuance of State or local bonds that every voter therein should be a freeholder of land within the State or political subdivision to be obligated and that the General Assembly should decide who should be a freeholder for such purposes. This amendment, as you know, was defeated and, therefore, the provisions of § 15-666.77 are of no effect.

Section 6.05 of the Charter of the City of Virginia Beach reads as follows:

"No bonds of the city shall be issued until their issuance shall have been authorized by a majority of the qualified voters of the city voting at an election held for the purpose and in the manner provided by general law; provided, however, that the council may issue bonds in an amount not exceeding $500,000 in any calendar year or notes in anticipation of the collection of revenue without submitting the question of their issuance to the qualified voters."

In my opinion, the question of issuance of bonds must be submitted to the qualified voters of the city and in order for the bond issue to prevail, a majority of the qualified voters of the city voting in the election held for that purpose must be in favor of the bond issue. To the extent that § 15-666.77 would require a vote of the freeholders in such an election, and would exclude non-freeholders from voting, it is in violation of Section 115a of the Constitution. See: Carlisle vs. Hassan, 199 Va. 771, 102 S. E. (2d) 273.
ELECTIONS—Candidates—County office candidates not required to file notice with State Board of Elections.

March 26, 1963

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney of King George County

This will acknowledge receipt of your letter of March 21, 1963, in which you refer to an opinion of this office dated August 1, 1955, Report of Attorney General, (1955-1956), p. 59, to the Honorable A. D. Johnson, Commonwealth's Attorney of Isle of Wight County, Virginia, in which it was ruled that the notice of candidacy and petition for county elections must be filed with the State Board of Elections as well as with the clerk. You state that on the basis of this opinion, you expect to advise candidates for county offices that it will be necessary for such candidates to have their petitions signed in duplicate, one to be sent to the State Board of Elections, along with the notice of candidacy, and one to be filed with the clerk with said notice.

The opinion to which you refer was based upon § 24-345.3 of the Code. That section, however, has been subsequently amended and the notice of candidacy and the petition are no longer required to be filed with the State Board of Elections in connection with county offices. The provisions of § 24-131 would apply.

ELECTIONS—Candidates for Office—Cannot qualify unless capitation taxes paid.

ELECTIONS—Capitation Taxes—Candidate for office must have paid taxes in order to qualify.

September 28, 1962

HONORABLE R. PAGE MORTON
County Judge
Charlotte County

This will acknowledge receipt of your letter of September 26, 1962, which reads as follows:

"Miss Mary E. Eggleston moved to Charlotte Court House in June 1958, and has been a resident here since that time. She had lived formerly in North Carolina.

"Miss Eggleston failed to pay her capitation tax for the year 1959, but she paid the capitation taxes for the years 1960 and 1961. She ran for town council of Charlotte Court House at the election held in June, 1962. Her name was on the ballot along with ten or eleven others. The town council is composed of six members. Miss Eggleston was among the top six and was declared elected. The question has now arisen whether she can serve since she has not paid her 1959 capitation tax.

"The question was raised by Miss Eggleston. She has not qualified as a member of the town council. The other members of the town council would like for her to serve, if such is possible, and no one has raised the question except Miss Eggleston. We would like to know if she can qualify and serve in view of the facts stated."
"In the event that Miss Eggleston cannot serve, would it be proper for the candidate who was seventh on the ticket to qualify as a member of town council, or would the present five members of the council have to elect the other member, or would it be necessary to have another election for the purpose of completing the list of six council members?"

Under prior rulings of this office, Miss Eggleston would have been entitled to qualify for the office to which she was elected if she had paid her 1959 poll tax on or before September 1, 1962. I enclose an opinion on this point, which is published in the Report of the Attorney General for 1956-1957, at page 103.

Inasmuch as Miss Eggleston failed to qualify, a vacancy exists. You will note that under §14-422 she was required to qualify on or before the day on which her term began. Failure to qualify created the vacancy.

The vacancy in this instance may be filled by the procedure set forth in §15-423 of the Code. Miss Eggleston was neither "adjudged disqualified" nor expelled, hence no election to fill the vacancy would be proper. Furthermore, since there are no vacancies in the majority of the council, the Court may not fill the vacancy. This is a vacancy "occurring otherwise during the term," as used in the Code section under consideration and, therefore, the council should fill the vacancy from the electors of the town. Should Miss Eggleston pay her 1959 tax prior to the filling of the vacancy by the council, she would be eligible to election by the council. This conclusion is based upon the assumption that there is no provision in the town charter providing another method for filling such vacancies. I have been unable to find any reference to any act providing a charter for Charlotte Court House.

In light of the foregoing, the question in the terminal paragraph of your letter need not be discussed.

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ELECTIONS—Capitation Taxes—Exemptions—Members of active reserve not considered in active service.

HONORABLE WM. M. McCLENNY
Commonwealth's Attorney for Amherst County

July 5, 1962

This is in reply to your letter of July 3, 1962, which reads as follows:

"I have in hand a copy of an opinion written to Mrs. Dorothy K. Harvey, Treasurer of Amherst County, dated June 18, 1962 relative to poll taxes by active army reservists. I do not feel that the opinion that she received was clear on the point that I have in mind. It concerns a member of the active reserve who was ordered into active duty with full pay and allowances to serve at Fort Lee, Virginia, for two weeks. This service consisted of maneuvers and other activity. After this period of service the reservist was released from active duty by orders rather than being discharged from the service entirely.

"My question is, is this period of service construed as active service under Article XVII of the State Constitution and Chapter 2.1 of Title 24 of the Code of Virginia? We have an election coming up July 10 and I would appreciate an early reply for that reason."

I think there is a distinction between being in "active service" as contemplated by Section 1, Article XVII of the State Constitution and being on "active duty" as a member of the Active Reserves.

Therefore, I am of the opinion that your question must be answered in the negative.
ELECTIONS—Capitation Taxes—Person becoming twenty-one years of age on January first.

March 11, 1963

HONORABLE WILLIAM M. McCLENNY
Commonwealth’s Attorney of Amherst County

This is in reply to your letter of March 7, 1963, which reads as follows:

"Should a person who became twenty-one (21) years of age January 1, 1963 pay one year’s poll tax in order to vote in the July 9, 1963 primary? I refer to Section 24-67 of the Code of Virginia."

The answer to your question is in the affirmative. Under Section 20 of the Constitution and § 24-67 of the Code, a person who has become twenty-one years of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, may register if he has paid one dollar and fifty cents, in satisfaction of the first year’s poll tax assessable against him. Under §§ 58-4 and 58-49 of the Code, the State poll tax is levied as of January first of each year. A person who becomes twenty-one years of age on January first of any year is assessable for the poll tax for that year and must pay the tax in order to qualify to register. If a person becomes twenty-one years of age on January second or thereafter in any year, he may register during that year without the payment of the poll tax.

ELECTIONS—Election Judge—Member of school board may not be appointed.

PUBLIC OFFICERS—Compatability—Member of school board may not serve as election judge.

June 7, 1963

HONORABLE HORACE T. MORRISON
Commonwealth’s Attorney for King George County

This is in reply to your letter of June 6, 1963, which reads as follows:

“Our County Electoral Board recently appointed a member of the County School Board to serve as a Judge in the coming elections. This appointee, however, has not been notified of his appointment.

“The Chairman has asked my opinion as to whether a member of the school board is legally qualified to hold the office of election judge. I have advised him that, in my opinion, Section 24-31 of the Code and Section 31 of the Constitution of Virginia, prohibiting an office holder from serving as such Judge, applies to ‘elective’ officers, as distinguished from an appointee.

“I would appreciate an opinion from your office as to whether I have correctly interpreted these laws. Since early action upon the appointee is necessary, I hope you will find it convenient to answer this inquiry at an early date.”

Judges of election are appointed pursuant to Article 3, Chapter 11, Title 24 of the Code. It will be noted under § 24-193 that judges of election are public officers and their appointment is for a term of one year, or until their successors are appointed. Such judges are required to take the oath prescribed in § 24-199. Section 22-69 of the Code states that no state or county officer shall be chosen or allowed to act as a member of the county school board. There are certain
exceptions to this prohibition but they do not apply to judges of election. In my opinion, any member of the county school board who takes the oath of office and qualifies as a judge of election will be in violation of § 22-69. I would suggest, therefore, that the member of the school board involved should decline to accept the appointment as judge of election.

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ELECTIONS—Electoral Boards—Political party recommendations not required.

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

February 18, 1963

This will acknowledge receipt of your letter of February 11, 1963, enclosing a letter to you from Mr. I. R. Dovel relating to § 24-29 of the Code of Virginia, which provides for the appointment of electoral boards. Mr. Dovel, after quoting a part of said section, presents the following questions:

"Under this section we Republicans are entitled to one member, since we did not carry the state in the last election for governor. Now, who selects our representative? Does not the Republican organization in each county and city have the right to do so, and is it not mandatory on the part of the Judge to respect our recommendations? Or, does the Judge, a member of the Democratic Machine, have the right to disregard the wishes of the Republicans concerned and name someone to his liking?"

In the counties the appointment of the members of the electoral board is the sole responsibility of the judge of the circuit court. Two members of the board shall be from the political party which cast the highest number of votes in the State for Governor at the last preceding gubernatorial election. One member shall be from the political party which cast the next highest number of votes for Governor in that election.

Neither this section of the Code nor Section 31 of the State Constitution provides that the judge shall make appointments to an electoral board pursuant to nominations or suggestions from either of the political parties entitled to representation on the board.

A judge may, if he so desires, seek the advice of the leaders of the respective political parties, but he is not required to do so nor would he be bound by their recommendations.

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HONORABLE ORBY L. CANTRELL
Member, House of Delegates

May 16, 1963

This is in reply to your letter of May 14, 1963, enclosing copy of a resolution adopted by the Forty-first Legislative District Committee on April 30, 1963. This Committee is composed of the chairmen of the Democratic Committees of the counties of Lee and Wise, and the chairman of the Democratic Committee of the city of Norton. The resolution reads as follows:

"We, the members of the committee, along with a vast majority of the Democrats of this legislative district which comprises the counties of Lee and Wise and the city of Norton are of the firm opinion that
REPORT OF THE ATTORNEY GENERAL

Wise County and the city of Norton should have a candidate and Lee County should also have a candidate for the House of Delegates in this fall’s general election to be held on November 5, 1963.

"Therefore, be it resolved that if Wise County and the city of Norton have more than one candidate file in the convention, the delegates representing Wise County and the city of Norton, caucus and select one name from those filed and present it to the convention for its consideration. The same procedure will be followed by Lee County should they have more than one candidate file.

"Be it further resolved that a copy of this resolution be published in at least one newspaper in each county and city in this legislative district at least thirty days prior to the time of the convention."

You have requested my opinion "as to the legality of this resolution and whether or not the convention would have to be governed by it."

Under § 24-12 of the Code, the Forty-first Legislative District is entitled to two representatives in the House of Delegates in the General Assembly of Virginia. Under the statutes and the Party Plans, any member of the Democratic Party (as defined in the Party Plans) who is qualified to vote in the Forty-first District at the general election to be held in November, 1963, is entitled to be a candidate for nomination for one of the seats in the House of Delegates, regardless of his place of residence in the District. The three political subdivisions constitute a unit for the purpose of representation, without regard to the dividing lines between the three jurisdictions.

The resolutions in effect divides the Forty-first Legislative District into two districts—in that it makes it mandatory that the convention as a whole shall nominate one candidate who is endorsed by the majority of the delegates from Lee County and one candidate who is endorsed by the majority of the delegates from Wise County and the city of Norton.

The question under consideration is strictly a party matter, as distinguished from a legal matter, and I doubt very much whether the Attorney General is authorized under the statutes to make a determination. It is provided in Section 6, page 7 of the Party Plans that:

"The Democratic State Central Committee shall have entire charge and full control of all party matters arising throughout the State. All powers which inhere in the Democratic Party of Virginia or the Democratic State Convention shall be vested in the Democratic State Central Committee at such times as the Democratic State Convention is not in session."

I believe the Democratic State Central Committee has exclusive jurisdiction under the Party Plans to determine whether or not the procedure in question is authorized by the Plans.

I suggest that the question should be certified to the Chairman of the Democratic State Central Committee with the request that a ruling be made by that body.

ELECTIONS—Primary—Candidates—Authority to withdraw.  

HONORABLE JOSEPH T. FITZPATRICK  
Secretary of the Electoral Board  

June 26, 1963

This is in reply to your letter of June 25, 1963, in which you present the following question:

"If a candidate desires to withdraw and have his name removed from the Ballot less than thirty days prior to the Democratic Primary Election. Can we legally comply with his request?"
REPORT OF THE ATTORNEY GENERAL

There is no statute which would permit the electoral board to strike from the ballot the name of the party who wishes to withdraw as a candidate in the primary election, when the date of the primary is less than thirty days from the date of withdrawal. Of course, this person can make a public announcement to the effect that he is no longer a candidate and does not wish the voters to vote for him.

Section 24-234 of the Code applies to general elections and not to primaries.

ELECTIONS—Primary—Candidate and voter qualifications—Challenges.

June 18, 1963

HONORABLE EDWARD E. HADDOCK
Member, Virginia State Senate

This is in reply to your letter of May 29, 1963, in which you present a series of questions with request that I furnish you an opinion with respect thereto.

Question No. 1: "Is residence in a precinct a prerequisite to qualify as a delegate from that precinct? If so, what duration of time is required as a resident?"

I assume this question has reference to a selection of delegates to a county or city convention. The question of residence for the purpose of voting is a matter of intent. Once a person has established his residence in a particular locality for the purpose of voting, he may continue to maintain that place as his voting residence so long as he does not move to another location with the intention of establishing that location as his permanent residence. Removal from a place with the intention of ultimately returning does not cause a person to lose his right to vote in the place in which it has been established. Under the Constitution, in order for a person to be qualified to vote in a particular precinct in this State, he must have been a resident of the precinct for thirty days preceding the election in which he offers to vote.

In order for a person to be qualified to represent a precinct as a delegate in a convention, he must be a qualified voter at such precinct.

Question No. 2: "Is residence in a precinct a prerequisite to serving as a delegate from that precinct after election? In other words, if a person has been elected as a delegate and moves from the precinct before he serves as a delegate, is he still eligible to serve?"

The answer to this question is, of course, dependent upon the question whether or not the person has moved from the precinct with the intention of making the new residence his permanent residence, or if he has the intention of ultimately returning to the precinct from which he moved.

Question No. 3: "Who can challenge a voter participating in a General Democratic Primary? When, where and how should the challenge be made?"

Section 24-368 of the Code sets forth the method for challenging a voter in a primary. The challenge would have to be made at the time the voter offers to vote. In this connection, attention is called to Section 2 of the Democratic Party Plan, under the heading "Members of the Democratic Party," which section is found on page 12 of the Party Plan. An opinion by former Attorney General Abram P. Staples, dated October 2, 1939, published in Report of Attorney General (1939-1940), at p. 67, is in point. I enclose herewith copy of said
opinion. It would seem under Mr. Staples' opinion that in order for a person to be subject to challenge under the Party Plan, it is first necessary for the appropriate Democratic Committee to adopt the resolution referred to in Section 2 of the Party Plan, referred to above. It appears that under this section the State Party Plan does not contemplate that voters will be subjected to a challenge unless the resolution is adopted. Section 24-368 provides for challenge for other reasons, such as lack of residence in the precinct, or some other failure to meet the statutory and constitutional qualifications.

*Question No. 4:* "Upon what information does one base his decision to challenge a voter?"

I do not see how this question can be answered.

*Question No. 5:* "In a Democratic precinct election, is it legal to require voters to sign their ballots?"

There is nothing in the Party Plan nor the statutes with respect to this matter. I assume this question relates to a precinct mass meeting for the purpose of electing delegates to a city or county convention. If this is true, it would seem that paragraph 1, under the title of "Conventions" on page 8 of the Party Plan, may be broad enough to authorize the Democratic Committee of the county or city which issued the call for the convention to adopt a resolution to the effect that persons voting in mass meetings shall sign their vote. Furthermore, Section 2 of the "General Provisions" on page 14 of the Party Plan provides as follows:

"2. The district or local committees shall have the power to adopt such further by-laws or rules and regulations as they shall deem necessary or expedient, and whenever such by-laws or rules or regulations are not in conflict with the State Primary Laws, the Democratic Party Plan or the Primary Plan of the Democratic party, then they shall be valid and binding and shall be construed to be part of the law of the party."

*Question No. 6:* "In a Democratic convention, is it legal to require voters to sign their ballots?"

The answer to question 5 is appropriate to question 6.

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ELECTIONS—Primary—Capitation tax—Deadline for payment.

*Honorable Wm. M. McClenney*

Commonwealth's Attorney of Amherst County

March 21, 1963

This is in reply to your letter of March 19, 1963, which reads as follows:

"As you are aware Amherst County will have a special election July 9, 1963. Questions have been raised as to who will be qualified to vote in this election from the standpoint of the time of paying their taxes. I refer to Section 24-22 and letter of Hon. Lindsay Almond, dated December 6, 1955. What taxes must be paid, that is what years, and by what time must these taxes be paid by a voter who was not a qualified voter in the past November election to vote in this primary. New voters becoming of age are excepted from this question. As I interpret the statute taxes must be paid for the years of 1960, 1961 and 1962 and must be paid on or before December 11, 1962."
I assume that you have reference to the voting qualifications in a primary to be held on July 9, 1963.

Under the provisions of § 24-367 of the Code, those persons who may vote in a primary election are those persons who are qualified to vote in the regular election to be held in November of that year. In order for a person to be eligible to vote in the November election in 1963, he must have paid the poll taxes assessed or assessable against him for the next three preceding years; that is, for the years 1962, 1961 and 1960. These taxes must be paid six months prior to the November election and not necessarily on or before December 11, 1962, as you have suggested.

June 6, 1963

HONORABLE PHILIP P. BURKS
Treasurer of Bedford County

This is in reply to your letter of June 5, 1963, which reads, in part as follows:

"A person over twenty one years of age moved from Tennessee to Virginia in August 1962 and became a resident of Bedford County in August 1962. The person in question has applied to a registrar to register on or before the deadline of June 8, 1963 in order to vote in the Primary on July 9, 1963. The registrar questions her right to register the person in question for the reason that the said person will not be a resident of Virginia for one year as of the date of the Primary on July 9, 1963.

"It is my understanding that if a person can qualify to vote in the general election on November 5, 1963 then said person can register and vote in the Primary on July 9, 1963. Please advise me if the person who became a resident of Virginia in August 1962 is entitled to register and vote in the Primary on July 9, 1963 even though said person has not been a resident of Virginia for one year as of July 9, 1963."

Section 26 of the Constitution of Virginia provides as follows:

"Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution."

Section 24-76 of the Code of Virginia provides as follows:

"The registrar shall, at any time previous to the regular days of registration, register any voter entitled to vote at the next succeeding election who may apply to him to be registered."

Under these constitutional and statutory provisions, the individual in question is entitled to be registered at this time. The registrar has no right to decline to register this person on the ground that he has not been a resident of the State for at least one year. The critical question involved is whether or not he will have been a resident of Virginia for at least one year when the regular election in November takes place.

This person was not a resident of Virginia on January 1, 1962 and, therefore,
he was not assessable for poll tax for any of the three years next preceding that in which he offers to register as required by Sections 20 and 21 of the Constitution. In my opinion, this person is entitled to register at this time and will be eligible to vote in the primary to be held on July 9 for the purpose of selecting candidates for the November 1963 election.

A previous opinion somewhat similar to this one was issued by this office on July 12, 1951 to E. S. Bishop, Secretary of the Montgomery County Electoral Board, and is published in the Report of the Attorney General (1951-1952), at p. 75.

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ELECTIONS—Primary—Changes—Clerks of elections—Who entitled to appointment.

April 23, 1963

Mr. James W. Wolcott
Chairman, Electoral Board, City of Norfolk

This will acknowledge receipt of your letter of April 22, 1963, which reads as follows:

"We are today in receipt from the Chairman of the Republican Party in the City of Norfolk a list of Judges and Clerks, requesting their appointment for the coming Democratic Primary.

"Is the Republican party entitled to have Republican Judges and Clerks appointed in a Democratic Primary?"

"The appointment of judges for primary elections is controlled by § 24-353 of the Code, which reads as follows:

"The primaries provided for in this chapter shall be held by three judges appointed for each party participating from members of that party by the electoral boards of the respective cities and counties in the State, upon application made by the duly constituted authorities of the party or parties desiring to hold a primary under this law, in such manner as may be provided by the party plan of such party or parties, one of which judges so appointed shall act as clerk in the conduct of such primary so held, at each of the several precincts as now designated or as may be hereafter provided by law."

Under this section, in the case of a Democratic primary, no Republicans would be entitled to appointment as judges of election. Conversely, if this were a Republican primary, no Democrats could be appointed as judges.

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ELECTIONS—Primary—Committeemen for political parties.

April 12, 1963

Michael A. Korb, Jr., Esquire
Acting City Attorney for City of Portsmouth

This will acknowledge receipt of your letter of April 11, 1963, in which you state that the Democratic Executive Committee for the City of Portsmouth had provided for an election to be held on July 9 (primary date) for members of the City Democratic Committee. It has now been determined that no primary election will be necessary in the City of Portsmouth due to the fact that there
is no opposition to the one senator and two delegates who have qualified for the primary. However, there is opposition in five of the thirteen wards of the city for membership on the Democratic Executive Committee, and, for that reason, it will be necessary to hold an election for that purpose. You further state:

"Since it will not be necessary to hold the Democratic primary, the City will be put to a considerable expense to hold an election for membership on the Democratic Executive Committee in five wards, therefore, we would like to know the following:

1. Can the election for membership on the Democratic Executive Committee be postponed until the date for the November general election?

2. If the election can be postponed, will those candidates who have already qualified still be eligible for election to the Democratic Executive Committee in November?"

Section 24-364 of the Code provides that each political party shall have the power to provide in any way it sees fit for the election of state, city or county committees. Section 2 of the Democratic Party Plans, under the heading "Democratic County and City Committees" provides as follows:

"2. The Democratic voters of each city shall elect a Democratic City Committee. The existing City Committee shall determine the basis of representation of each precinct or ward and designate the time and place and method for the election of said committeemen. Whenever the election of said committeemen is by some method other than a primary election conducted under the State primary laws, then in such case notice of the time, place and method for the election of said committeemen shall be given by publication in a newspaper published in said city at least ten days prior to the time for such election. In the event that there be no newspaper published in the said city, then such notice shall be given by posting the same at each precinct therein for ten days prior to such election."

Although the City Democratic Committee has provided that an election for city committeemen shall be held on the primary election date, in my opinion, under this section of the Party Plans, the Democratic Committee of the city may convene and pass a resolution postponing the election for Democratic city committeemen until the regular election in November, 1963. In this resolution, I see no reason why the city committee could not provide that the candidates for election in the November election shall be those candidates who have qualified in the July 9 primary election. Of course, under the provisions of the Party Plans quoted above, it will be necessary that the Democratic City Committee publish a notice of the time, place and method for the election of the committeemen in a newspaper as required by said section.

In your letter you refer to the expense incident to holding an election. In this connection, I am enclosing copy of an opinion of this office dated March 8, 1955, to Honorable Harrison Mann, in which it was held that the expense of printing ballots for this type of election may not be at public expense.

I believe the foregoing answers both of your questions.
ELECTIONS—Primary—Must be conducted pursuant to statute—No duty on State Board to prevent illegal primary election.

July 18, 1962

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This will acknowledge receipt of your letter of July 17, 1962, enclosing a copy of a resolution adopted by the Executive Committee of the Democratic Party of Carroll County. In this resolution it is stated that the Republican Party organization of Carroll County has called a primary election to be held on October 6, 1962, to nominate candidates for the next general election for county offices to be held in November, 1963. It is stated that the rules promulgated by the Republican County Committee to govern the primary provide, in part, as follows:

"(1) That the primary is to be held on the 6th day of October, 1962.

"(2) That each person desiring to file as a candidate must pay a fee to the party treasurer of 5% of the remuneration of the office for which he files for one year.

"(3) That a person will be eligible to vote in the primary if having ever registered, without the payment of his or her poll taxes, for any year since registration.

"(4) That publicly owned polling places and official registration books will be employed in conducting the primary.

"(5) That any person voting in the primary is morally bound to support the winner of the primary, * * *

The resolution adopted by the Democratic Executive Committee contains the following paragraph:

"NOW, THEREFORE, BE IT RESOLVED BY THE EXECUTIVE COMMITTEE OF THE DEMOCRATIC PARTY IN CARROLL COUNTY that the State Board of Elections be requested to make such investigation of the foregoing as it shall deem proper, and to institute all such proceedings as may be necessary to compel a discontinuance of said primary and to compel the Republican party organization in Carroll County in the selection of its nominees for the general election to comply with the election laws of the Commonwealth of Virginia."

This office, as you have pointed out, has issued two opinions holding that primary elections must be held in conformity with Chapter 14, Title 24 of the Code. These opinions are published in the Report of the Attorney General (1949-1950), p. 107, and Report of the Attorney General (1958-1959), p. 125. Section 24-347, contained in Chapter 14, provides that—

"A primary when held shall be conducted in all respects under the provisions of this chapter."

Therefore, the election officials charged with the duty of certifying nominees for the purpose of having their names printed on an official ballot in a general election may not make such certifications of primary nominees unless the primary election has been conducted in conformity with the statutory procedure.
Persons who have been selected as candidates representing the Republican Party under the procedure adopted by the Republican Committee in Carroll County may, nevertheless, qualify as candidates in the general election by complying with the procedure set forth in §§ 24-130 through 24-133, which relate to the method of filing by persons who are not eligible to be certified as candidates under § 24-134.

In my opinion, the State Board of Elections is not authorized to make the investigation as requested by the resolution of the Democratic Committee. Furthermore, there is no statute under which the State Board may institute proceedings to prevent the Republican Committee of Carroll County from conducting their unofficial primary.

The duties of the State Board in general are set forth in § 24-25 of the Code.

ELECTIONS—Primary—Republican Preferential Primary—Winners have no legal standing if primary not conducted according to law.

October 4, 1962

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of October 3, 1962, enclosing a letter from Mr. Early Webb, member and Chairman of the Carroll County Electoral Board, stating that they would like a further clarification of our letter of July 18, 1962, to you on the Republican Preferential Primary to be held on October 6, 1962, in Carroll County.

As stated in our letter of July 18, 1962, the winners of the proposed preferential primary have no legal standing, as the so-called primary is not conducted under the laws relative to primaries. Such winners having no legal standing, as such, have to qualify in the usual manner by convention or as independent candidates, in accordance with the details set forth in our letter of July 18, 1962, as any other person would have to do, whether or not he was in the preferential primary.

Section 24-115 provides that every registrar shall preserve order at and in the vicinity of the place of registration and he may exclude from the place of registration all persons whose presence he deems unnecessary and may take the proper steps to preserve order, as specified in the above-mentioned section. You state that the so-called preferential primary is being conducted on Registration Day. The registrars would, under the above-mentioned section, be entitled to exclude from the place of registration all persons whom they deem unnecessary for the purpose of performing their duties as registrars.

ELECTIONS—Primary—When run-off election permissible.

May 1, 1963

MR. CHARLES F. ADAMS
Chairman, Pittsylvania County Democratic Committee

This will acknowledge receipt of your letter of April 29, 1963, in which you state that on March 9, 1963, the Pittsylvania County Democratic Committee adopted a resolution providing for a primary election for the purpose of nominating candidates to run for various offices in the general election to be held in November, 1963. The Resolution is as follows:

"BE IT RESOLVED, that the Democratic nominees for the offices of
Sheriff, Treasurer, Commissioner of the Revenue, Commonwealth's Attorney, members of the Virginia House of Delegates, Supervisors and Justices of the Peace in each of the Magisterial Districts of Pittsylvania County, Virginia, shall be selected at a Democratic Primary to be held in Pittsylvania County, Virginia, on Tuesday, July 9, 1963, subject to the primary election laws and the Democratic Party Plan of the Commonwealth of Virginia."

You state that there are more than two candidates for some of the offices and you request my opinion with respect to the following question:

"The question has arisen as to whether or not the County Committee can now provide for a run-off primary subject to the general law on the subject. That is, if the candidate with the second highest number of votes requests a run-off."

Section 24-359 of the Code provides for a mandatory second primary for certain offices (not including local offices and members of the General Assembly) and provides further:

"* * * Any candidate for party nomination to any other office who receives a plurality of the votes cast by his party shall be the nominee of his party for such office and his name shall be printed on the official ballots used in the election for which the primary was held. But nothing in this section shall prohibit the county or city committee of any political party from holding a primary which requires a majority of the vote cast in the primary to nominate. * * *"

Section 24-397 of the Code provides as follows:

"Nothing in this chapter shall be construed to require the county and city treasurers to pay expenses of more than one primary held by any one party for one election except a second primary held for the nomination of a candidate for the office of United States Senator in the Congress of the United States, Governor, Lieutenant Governor or Attorney General as provided by law, but if any of the subordinate party committees call a primary at a date other than the date for the general primary, then the expenses of the primary called by such subordinate party committee shall be paid by the candidates themselves."

It will be observed that § 24-359 authorizes the local county or city committee to adopt a resolution which would require a majority of the votes cast in a primary election to nominate. This provision was not contained in the Resolution of your committee calling the primary. If the Resolution had provided for a run-off primary, a candidate when filing would have known that there was a possibility he would be required to submit to a second primary and to incur the expense incident to a run-off as provided in § 24-397. While the statute is not explicit on the point, in my opinion, the provision for a run-off primary must be included in the Resolution calling the primary election. The statute makes it mandatory that a run-off be held in connection with certain offices in case no candidate receives a majority of the votes cast and the candidates have the benefit of knowledge of this requirement when they file. I think it is reasonable to conclude that the opportunity given to the local committees to provide for a run-off contemplates that this will be done when the primary is called or at least before the deadline date for filing. It is not reasonable to presume that the rules governing the primary may be changed after the time for filing has passed.

In my opinion, your question must be answered in the negative.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Registration Books—Expenses of purging—City may appropriate necessary funds.

CITIES—Appropriations—Authority to pay expenses of purging registration books.

June 10, 1963

MR. MARTIN K. COLE
Chairman, City Electoral Board of Colonial Heights

This is in reply to your letter of June 5, 1963, in which you state that under resolution adopted by the council of the city of Colonial Heights on July 17, 1962, the city electoral board directed the registrar to purge all the registration books of the city. You state that the registrar has performed this work and has submitted a statement of $1858.35, representing $20.00 expenses, $919.18 for employment of one aide to assist in the purge, and $919.17 for his own services rendered as registrar. You further state that the city of Colonial Heights has a general registrar and that he receives an annual compensation of $600.00. You further state that the registrar is required to be on duty from 9:00 A.M. to 12:00 Noon, twice a week. You request my advice as to the legality of the payment of the statement submitted by the registrar.

The city of Colonial Heights employs a general registrar and, therefore, § 24-106 applies. Section 24-96 applies to the purging of registration books in localities where there is no general registrar but each precinct has a separate registrar. Section 24-110 provides that all costs incurred in the purging of the registration books by the general registrar shall be borne by the city. This section differs from § 24-101, which, apparently, applies to the purging of the registration books where there is a registrar for each separate precinct, and in which there is set forth certain specific costs.

Section 24-101 of the Code reads as follows:

"When a general purging of the registration books is ordered, as here-inbefore required, the registrar, after he has purged the registration books, shall make a copy of the books in like manner as provided in § 24-93, leaving off all names stricken therefrom under the provisions of §§ 24-96 to 24-100. As additional compensation for services under this section, the registrar shall receive the sum of twenty-five cents for each name purged and ten cents for each name copied, provided no additional compensation shall be paid a full time salaried registrar. The registrar shall be compensated for all necessary expenses incurred in a general purging including the cost of mailing notice to persons alleged to be improperly on registration books."

There is nothing in the statute to determine what would be considered as costs under § 24-110 unless the provisions of § 24-101 would apply. It will be noted under this section that the registrar is entitled to an additional compensation for services in connection with purging the registration books of twenty-five cents for each name purged and ten cents for each name copied, subject to the proviso that no additional compensation shall be paid a full time salaried registrar. In addition, under § 24-101 the registrar shall be compensated for all necessary expenses incurred in a general purging, including the costs of mailing notices by certified mail as required in § 24-107. Inasmuch as the registrar in this instance is required to be on duty for six hours only during a calendar week, it is obvious that he is not a full time registrar and, therefore, the proviso prohibiting the payment of additional compensation allowed in § 24-101 would not apply. The employment of extra help, it would seem, could be determined to be a necessary expense. The statutes are to some extent vague as to what would be a proper charge by a general registrar for purging the books.

In my opinion, however, there is nothing in the statutes which would prohibit the council of the city of Colonial Heights from making an appropriation to the
electoral board for the purpose of meeting these expenses, if they include the statutory rate for purging and copying, and it is found that the other items are "necessary expenses incurred" by the registrar.

ELECTIONS—Registration—Person reaching twenty-one years of age on November sixth.

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This will acknowledge receipt of your letter of March 19, 1963, in which you present the question as to whether or not a person whose twenty-first birthday will be celebrated on November 6, 1963, is eligible to register and vote in the general election to be held on November 5, 1963.

Under Section 18 of the Constitution of Virginia, which is implemented by § 24-17 of the Code, "every citizen of the United States twenty-one years of age * * *" is qualified to vote from the standpoint of age, if he meets all the other qualifications. Under the common law, a person is twenty-one years of age on the day preceding the twenty-first anniversary of his birth (see 18 Am. Jur.—Elections, Art. 53, p. 215, Vol. 18; C.J.S. 29, Elections—Age, Art. 17, p. 38; Words and Phrases, 21—page 478, Vol. 42A.).

The question here is comparable to the question as to when a child has reached his sixth birthday so as to be eligible for school attendance under § 22-218.1 of the Code. Under that section, it is provided that children shall be admitted to the primary grades of the public schools "who have reached their sixth birthday on or before September thirtieth." In an opinion dated March 25, 1952, published in Report of the Attorney General (1951-1952), p. 126, this office ruled that a child whose sixth birthday is celebrated on October first has reached his sixth birthday on September thirtieth. In that opinion, the Attorney General at that time stated, "I have previously been called upon to study this problem in connection with the age requirements for voting. At that time I discovered that the rule at common law was that a person attains his next year of age on the day prior to his birthday."

It has been consistently held by the courts that the law does not recognize a fraction of a day. A person who will celebrate his twenty-first birthday on the sixth day of November will be commencing his twenty-second year on that date, and attain the age of twenty-one on the previous day.

In my opinion, your question must be answered in the affirmative.

ELECTIONS—Residence—How determined.

HONORABLE R. H. L. CHICHESTER
Commonwealth's Attorney of Stafford County

This will acknowledge receipt of your letter of April 3, 1963, in which you present the following question:

"A person living in Washington, D. C., who owns real estate in Virginia and intends sometime in the future to build on the property, can this person pay the necessary capitation taxes, from the time which the property will be assessed to him, register and vote in the coming November election?"
The mere ownership of property at a particular place is not of itself sufficient to establish a legal residence of the owner of the property at the place where the property is located. In order for a person to establish himself as a resident of this State for the purpose of complying with Section 18 of the Constitution, he must not only have a physical place of abode at the place of new residence, but he shall have the bona fide intention of establishing such new residence at such new physical place of abode.

The answer to your question must be answered in the negative.

ELECTIONS—Residence—When voting precincts changed.

April 5, 1963

Honorable Levin Nock Davis
Secretary, State Board of Elections

This will acknowledge receipt of your letter of April 4, 1963, in which you enclose a letter to you from the Clerk of King and Queen County, relating to the election districts in Stevensville Magisterial District. It appears that there is no record by which the division lines of the voting precincts may be accurately determined. I quote the following from the letter to you from the Clerk:

"About three or four years ago the Electoral Board of King and Queen County moved the voting place of the Carlton Store precinct of Stevensville District from its location there to the Courthouse at King and Queen C. H., Virginia. There was no complaint about this move at that time, nor has there been any complaint since, there being no suitable place at the former location for a voting place. However, since the move of the voting place to King and Queen C. H., quite a number of voters, who had been voting at Stevensville precinct in the northern end of Stevensville district, and who live near King and Queen C. H., desire to transfer to the Carlton Store precinct. Since we can find no record of the precinct boundaries, we are at a loss to know how to advise the precinct registrars concerning these applications for transfer and as to whether or not they comply with Section 24-85, etc., of the Code. I have talked the matter over with Mr. D. S. Mitchell, Commonwealth's Attorney, as to whether or not the matter may be cleared up under Section 24-46 of the Code, but we are not certain this would apply if we do not know the present boundaries of the precincts; that is, can a precinct line which is not known, be properly re-arranged or altered.

"Even though no question has arisen as to the boundaries of the precincts of the other two districts in the County, we feel the matter should be cleared up for the entire county, but we do not know whether to proceed under the present law, or whether some special legislation should be enacted in our case."

It seems to me that it would be appropriate for the Board of Supervisors of the county to petition the circuit court of the county to reestablish the voting precincts for the magisterial district, or, if it is deemed necessary, for the county as a whole. The court, in my opinion, has ample power to consider and determine such matter under § 24-46 of the Code. If such procedure is contemplated, I call attention to § 24-51 as to the time when the order may be entered.

I am of the opinion that transfers under § 24-85 contemplate that the person applying therefor has actually moved his residence. Whenever the boundaries of the several precincts have been definitely established under the procedure allowed in § 24-46, et seq., it will be proper for the registrars of each precinct to place the names of registered voters residing in the boundaries of their respective precincts on the books of such precinct without a transfer certificate. In other words,
the several registrars could get together and see to it that each registered voter's name is placed on the proper precinct book.

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**ELECTIONS—Special—When Treasurer required to prepare list of registered voters.**

**March 11, 1963**

**Honorable William M. McClenney**
Commonwealth's Attorney of Amherst County

This will acknowledge receipt of your letter of March 7, 1963, which reads as follows:

"A special election is to be called in Amherst County which will take place under the Statute (Section 15-666.30), prior to the July 9, 1963 primary election, and the Treasurer of our county wishes to know whether a list of registered voters for such election is to be made by her office.

"Under Section 24-22 it appears that all persons qualified to vote at the preceding November election and already on the list of voters used at that election are qualified to vote, however, what should be done with those persons, otherwise qualified to vote who paid their taxes prior to December 11, 1962 which would be six months prior to the second Tuesday in June of 1963."

Section 24-120 of the Code does not require the treasurer to prepare and file a list of persons who have paid their poll taxes prior to the second Tuesday in June of each year unless there is to be held a regular June election in the county. However, it would be permissible for the treasurer to make and furnish such a list to the precinct officials for use in a special election and this would appear to be advisable. The list filed for the preceding November election must, of course, be furnished to the election officials at each precinct.

In this connection, I enclose for your consideration three opinions of this office, published as follows:


I believe these opinions will meet your requirements.

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**FIRE LAWS—County Regulation—No authority for counties to parallel State law.**

**April 29, 1963**

**Honorable John Paul Causey**
Commonwealth's Attorney for King William County

This will acknowledge receipt of your letter of April 26, 1963, which reads as follows:

"In view of the provisions of Sections 10-62 and 27-54.1 of the Virginia Code, does the County of King William have any authority,
by local ordinance, to prohibit or regulate the setting of fires near wood-
lands or brushlands, or is this jurisdiction reserved to the state under
these statutes?"

I can find no provision which, in my opinion, would authorize counties to
enact ordinances of this nature. Prevention of fire hazards seems to have been pre-
empted by the State under the provisions of Article 4, Chapter 4 of Title 10,
Article 2 of Chapter 5 of Title 27 and Chapter 6 of Title 27 of the Code.
I do not believe there is anything contained in § 15-8 which would delegate such
power to a county. The State laws with respect to this matter make provisions
for the appointment of fire wardens and forest wardens who have the powers and
duties prescribed by statute with respect to enforcing the State fire laws.
The only provision with respect to the authority of counties in connection with
this matter appears to be in the last paragraph of § 10-62 in which it is pro-
vided that the provisions of subsection (b) of § 10-62 shall not become effective
in any county unless and until it shall have been approved by a majority vote
of the governing body of the county.
Ordinances of this nature would, of course, require criminal penalties for their
violation. This office has consistently
held over the years that a board of super-
visors does not have the authority to enact laws similar to or paralleling the
general criminal laws of the State unless the General Assembly has expressly
authorized the same.
While much latitude exists under § 15-8 of the Code, which authorizes boards
of supervisors to adopt measures to secure the health, safety and general welfare
of the people of their respective counties, particularly with respect to matters of
purely local concern, it is doubtful, in my opinion, as to whether the powers
conferred by that section would extend to regulation of matters of a general
nature which are more properly the subject of regulation as a matter of State
law and regarding which various statutory enactments have been adopted.

GAME AND INLAND FISHERIES—Closed Season—Lawful for certain people
to hunt rabbits and squirrels—"Immediate family" defined.

HONORABLE CHESTER F. PHELPS
Executive Director, Commission of Game and Inland Fisheries

August 21, 1962

This is in reply to your letter of August 15, 1962, in which you request my
opinion relating to the construction of § 29-138 of the Code of Virginia which
provides an exception to killing rabbits and squirrels during the closed season
by landowners and their immediate families.
The expression "immediate family" does not have a definite denotation, the
meaning often depending upon the context in which the expression is employed.
Generally speaking, a family is a group of persons who live in one house under
one head. The word "immediate" preceding family would indicate that the
Legislature intended that there be some ties of relationship binding the family
together in this particular instance. Just how closely related to the landowner
one must be in order to constitute his immediate family, as intended by this
section, is doubtful. Apparently the Legislature intended to broaden this statute
to be more inclusive. Prior to 1960 the privilege for hunting during closed season
was confined to landowners and their children. In 1960 this section was re-
written to extend the privilege to a landowner, his wife or child. By extending the
privilege to a landowner's immediate family we must assume that the General
Assembly intended to include members of the family beyond the wife and child.
As the violation of this section constitutes a crime, it is well established that
any doubtful language must be construed strictly in favor of the accused.
I am, therefore, of the opinion that the offense of killing rabbits and squirrels
during closed season does not apply to any landowner or those members of his family related to him either by blood or marriage.

GAME AND INLAND FISHERIES—Deer and Bear—Relief for landowner suffering damages from big game.

October 31, 1962

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

This is in reply to your letter of October 24, 1962, relating to damage caused by deer and bear in Smyth County. You have referred to a county ordinance adopted pursuant to Chapter 420, Acts of Assembly of 1962, and to §29-145.1, Code of Virginia (1950), as amended, which give rise to the following inquiries:

"May I have your opinion on these questions? (1) In your opinion, is the County Ordinance and Section 29-145.1 unrelated? (2) Upon an application made pursuant to Section 29-145.1 where damages are alleged, is it mandatory that the Game Warden authorize the owner to kill such animals? (3) After reading the said Ordinance and the referred to Section of the Code of Virginia, in your opinion, is it the intent of the legislature that the complainant exhaust his remedy as set forth in the Ordinance before the Game Warden would be justified in granting the request made pursuant to Section 29-145.1 to kill such animals?"

In my opinion, the county ordinance is unrelated to §29-145.1 of the Code. The purpose of the ordinance is to establish a fund from which damages may be paid when it is established that the damage was caused to crops, trees, livestock or farm equipment by deer, bear or big game hunters. The purpose of §29-145.1 of the Code is to authorize the killing of deer when found in the act of damaging fruit trees or crops. Consequently, a landowner may seek relief by following the procedure set forth in §29-145.1 of the Code, or seek compensation for damages suffered by following the county ordinance adopted pursuant to Chapter 420, Acts of Assembly of 1962.

Your second inquiry is also answered in the affirmative, inasmuch as §29-145.1 of the Code expressly provides that the game warden shall authorize the owner or lessee to kill deer after an investigation discloses that deer have injured the fruit trees or crops of such owner or lessee. This conclusion is limited to the application of the Code section in question, and is not intended to be so construed as to prohibit a landowner from taking immediate action to destroy wild animals which may be caught in the act of damaging or destroying fruit trees or crops.

In view of the conclusion reached above in answer to your first inquiry, I think it necessarily follows that a landowner will not be required to exhaust his remedy for reimbursement under the county ordinance before seeking relief under the provisions of §29-145.1 of the Code.

GAME AND INLAND FISHERIES—Deer and Bear Damage Fund—How to be expended.

April 19, 1963

HONORABLE L. HARVEY NEFF, JR
Commonwealth's Attorney for Grayson County

This is in reply to your letter of April 5, 1963, in which you make several inquiries concerning the availability for expenditure of the special deer damage
fund created by the County of Grayson pursuant to Chapter 420, Acts of 1962.

The Act in question provides for the establishment of a special fund by the counties specified therein from which payment may be made for damage to trees, etc., caused by deer, bear and big game hunters. The fund is provided from fees charged for special game stamps which are to be affixed to the regular hunting license. The Act is effective only if the county adopts the appropriate ordinance.

For purposes of your inquiries, the following portion of the Act is here pertinent:

"* * * The money received from the sale of such special stamps shall be paid into the county treasury to the credit of a special fund and identified by the year collected, and the net amount thereof, or so much as is necessary, shall be used for the payment of damages to crops, fruit trees, livestock or farm equipment by deer, bear or big game hunters in the county whenever such damage amounts to ten dollars or more, provided, however, that in any case in which such damage was caused by hunters, and the hunter be known, the claimant shall have first proceeded in a civil action against such hunter. Upon payment of any such claim, the county shall be subrogated to the rights of the claimant against such hunter. Any payment under the provisions of this act shall be limited to the net amount accruing in the special fund from sales of such stamps for the county during the three preceding years in which the damage occurs. Any surplus remaining in the fund, which surplus has been in the fund more than three years, shall be earmarked for conservation, restoration, protection of wildlife and preventing damage by wildlife to property in said county under the direction of the board of supervisors and in cooperation with the Commission of Game and Inland Fisheries. Provided, however, that any county board of supervisors may transfer funds from such special fund before the end of three years for the purposes set forth above, so long as such board of supervisors appropriates sufficient money to satisfy claims which cannot be met by reason of such transferral. * * *" 
(Italics supplied)

Your inquiries arise by reason of a request having been made to the board of supervisors for mattresses and other furnishings for a lodge in the forest area which is utilized by special game wardens during deer season. Your inquiries read as follows:

"1. Does the Board of Supervisors have the authority to expend any sum from said fund until after expiration of the three-year period therein provided?
2. If so, does the Board of Supervisors have the right to refuse to expend any sum from said fund until after expiration of the three-year period therein provided?
3. Does the purchase of mattresses and like equipment for the Warden's lodge come within the meaning of the above quoted section?
4. Does the approval of the Commission of Game and Inland Fisheries have to be obtained before any sum can be expended?"

You will note that the fund must be identified by the year in which collected. From the portion of the Act which I have emphasized you will note that payment from the fund is limited to the net amount accruing from sales of stamps during the three years preceding the year in which the damage occurs. Any surplus which has accrued may be used for conservation purposes after such surplus has been in the fund over three years.

The proviso in the Act relating to the authority of the board of supervisors to transfer funds from the special fund prior to the expiration of three years
relates to the transfer into the general fund for conservation and restoration purposes. This three-year limitation has no reference to the authority to honor claims for damages and should not be interpreted as a requirement that the board of supervisors wait three years before expending any portion of the special fund for that purpose. The time limitation on the payment of claims is that which requires payment from those funds which are collected during the three years preceding the year in which the damage occurs. This, in effect, is a three-year limitation on the presentation of claims for damages.

In view of the foregoing, I am of the opinion that the board of supervisors may expend the special stamp fund prior to the expiration of three years from the year in which the funds are collected for the following purposes:

1. The payment of claims, limited to damages occurring during a three-year period from the year in which the money in the fund was collected;
2. Use for conservation, restoration, etc., provided the board appropriates sufficient money to satisfy any claims which cannot be met by reason of the board having transferred such fund prior to expiration of the three-year period.

Your third inquiry must be answered in the negative, for I do not consider the furnishing of a building, or the purchasing of housing equipment for game wardens to be an expenditure contemplated by the legislation in question.

Your fourth inquiry must also be answered in the negative, for the Commission of Game and Inland Fisheries has no authority or duties with respect to this fund. While the board of supervisors is authorized to expend the surplus in this fund for the purposes heretofore stated in cooperation with the Commission of Game and Inland Fisheries, there is no mandate that approval of the Commission be first obtained before paying damage claims or expending the surplus.

GAME AND INLAND FISHERIES—Deer and Bear Stamp Fund—Commissions for selling stamps.

May 8, 1963

HONORABLE RHEA F. MOORE, JR.
Clerk, Circuit Court of Tazewell County

This is in reply to your letter of April 22, 1963, with which you enclosed copies of bills submitted by you to the Bath County Board of Supervisors, together with other correspondence pertaining thereto, and in which you ask to be advised as to whether it is incumbent upon Bath County to pay a ten cent commission to you as Clerk of the Circuit Court of Tazewell County for selling big game damage stamps issued by Bath County, pursuant to Chapter 420, Acts of Assembly of 1962.

Sections 3 and 4 of the Acts of Assembly in question read as follows:

"§ 3. The special stamps herein provided for may be obtained from the clerks of the circuit courts of the counties listed in § 1 of this act who shall receive a fee of ten cents for each stamp issued."

"§ 4. The clerk of the circuit court of each of the counties listed in § 1 of this act may supply the clerk of the circuit court of each other such county, prior to July one of each year, with a supply of stamps for his county. Each such clerk shall annually after the close of the season for hunting deer or bear but not later than June thirty, return the unsold stamps to the clerks from whom received, and remit to each such clerk all moneys collected for sale of stamps for hunting in his county, less the fee of ten cents each for selling the same. The clerk may designate persons in his county as agents for the purpose of selling such stamps."
From the foregoing quoted provisions, it is apparent that the clerk issuing such stamps is entitled to a fee of ten cents for each stamp issued. When the clerk of one county supplies a clerk of another county with stamps, the clerk of the forwarding county would not normally receive any money therefor at that time. The stamps are subsequently issued by the clerk of the receiving county to hunters, and that clerk forwards ninety cents for each stamp sold to the clerk of the forwarding county, together with the unsold stamps.

In the instant case, it appears that the Clerk of Bath County did not supply you with stamps, some of which were to be sold and the remainder, if any, to be remitted to Bath County. In this case, you actually advanced the gross price of fifty stamps to the Clerk of Bath County at the time the stamps were forwarded to you, which appeared to be a sale rather than a consignment. Consequently, the Clerk of Bath County paid the total amount into the County Treasury and was allowed the usual ten cents fee for each stamp which had been forwarded to you.

Under these conditions I am unable to conclude that the County of Bath became indebted to you for issuing the Bath County game damage stamps. The Act in question does not contemplate a transaction such as that entered into here between the two clerks. Presumably, the clerk who issues the stamp to the hunter will collect $1.00 therefor as agent for the issuing county, and deduct a fee of ten cents before transmitting the proceeds to the clerk of the county which issues the stamps. That procedure was not followed in this case. I must, therefore, conclude that the County of Bath has incurred no obligation to pay a commission to you for issuing the Bath County game damage stamps.

GAME AND INLAND FISHERIES—Deer and Bear Stamp Fund—Disposition of funds accumulated.

HONORABLE ORBY L. CANTRELL
Member, House of Delegates

September 12, 1962

This is in reply to your letter of September 8, 1962, in which you make inquiry regarding the disposition to be made of funds in the bear and deer stamp fund accumulated prior to the effective date of Chapter 420, Acts of Assembly of 1962.

Section 2 of the aforementioned Act of Assembly expressly authorizes a transfer of monies heretofore accumulated in the fund derived from special stamp fees to the fund which is established when the board of supervisors adopts the necessary ordinance, as contemplated in § 1 of Chapter 420.

GAME AND INLAND FISHERIES—Fishing on Sunday—Prohibited in Highland County.

SUNDAY—Fishing—Prohibited in Highland County.

HONORABLE R. TURNER JONES
Commonwealth’s Attorney for Highland County

March 25, 1963

This is in reply to your letter of March 18, 1963, in which you request my opinion as to whether a local ordinance prohibiting fishing on Sunday, which was adopted by the County of Highland, pursuant to Chapter 12, Acts of Assembly (1930), is applicable to private ponds and leased streams which are stocked by a private corporation.
Neither the legislation authorizing the ordinance in question nor the ordinance itself draws any distinction between private and public waters. This general prohibition against fishing in the County of Highland on Sunday extends to all waters of the County, irrespective of the ownership of the land or the source of the stock.

GAME AND INLAND FISHERIES--Fish Traps—When dip net permit required.

April 10, 1963

Honorable Charlie T. Turner
Assistant Commonwealth’s Attorney for Pittsylvania County

This is in reply to your letter of March 29, 1963, in which you pose several questions relating to the taking of fish with fish traps in Pittsylvania County.

The general law on taking fish with traps is codified as § 29-148, Code of Virginia (1950), as amended. That section prohibits, in large measure, the taking of fish with traps, but expressly permits the use of these traps in Pittsylvania County. There are conditions attached, however, among them being that the fish so taken are not to be sold and that bass, perch and trout are not to be taken in this manner.

Your first inquiry raises the question of applicability of Regulation 53, adopted by the Commission of Game and Inland Fisheries and published in a leaflet which was revised as of July 1, 1962. That regulation relates to the taking of non-game fish with traps and pots by persons to whom dip nets are issued. Dip net permits are issued pursuant to Regulation 52. The Commission of Game and Inland Fisheries undertook to rescind Regulation 53 on January 1, 1963. Assuming the statutory provisions relating to such action were complied with by the Commission, I am of the opinion that Regulation 53 is no longer effective, and § 29-148 of the Code is the sole regulatory measure on taking fish with traps.

The rescission of Regulation 53 had no effect upon Regulation 52; hence, a dip net permit is still required to take fish with dip nets in any locality of the State. In addition thereto, any person so fishing must obtain a regular fishing license, as required by § 29-51, et seq., of the Code.

You also inquire as to whether the prohibition in § 29-148 of the Code against the taking of perch with fish traps also prohibits the taking of “bluegill.” You advise that many local fishermen maintain that bluegill is a type of perch.

Quite often the confusion that exists with respect to the classification of fish has been compounded by legislative enactments which use the commonly accepted names interchangeably with the generic name. Typical of such a practice is § 29-2.1(j) of the Code which defines “game fish” as being inclusive of "brook, rainbow and brown trout, all of the sunfish family, including largemouth bass, smallmouth bass and spotted bass, rock bass, bream, bluegill, crappie, walleyed pike or pike perch, white bass, * * * .”

While the foregoing definition is accurate enough to classify “game fish,” it is inconsistent with recognized classifications of the various species of fishes mentioned therein. For example, “bream” is not a particular class of fish, it being a commonly used name which can be applied to various fish species. Also, the walleyed pike or pike perch, and white bass are included in this definition as members of the sunfish family, along with bass, bluegill and crappie.

I am advised by the Chief of the Fish Division, Commission of Game and Inland Fisheries, that “bluegill” is a member of a fish family separate and distinct from the perch family and that the Commission so treats them.

In view of the foregoing, I am of the opinion that bluegill fish may be taken with fish traps in Pittsylvania County, although perch may not be so taken.
HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for the County of Botetourt

This will acknowledge receipt of your letter of September 18, 1962, which reads as follows:

"I would appreciate it if you would let me know whether or not the Board of Supervisors of Botetourt County has the authority to supplement the salary, or pay a mileage allowance, to the State Game Warden of our county.

"If in your opinion, the answer to my inquiry is yes, may the Board of Supervisors pay this expense out of the fund accumulated under the provisions of Chapter 420 of the Acts of Assembly of 1962. I refer you to Section 2 of said Acts, "Any surplus remaining in the fund, which surplus has been in the fund more than three years, shall be earmarked for conservation, restoration, protection of wildlife and preventing damage by wildlife to property in said county under the direction of the board of supervisors and in cooperation with the Commission of Game and Inland Fisheries."

"The State Game Warden investigates the claims made pursuant to our Ordinance enacted under Chapter 420 and entails traveling, which on occasion, causes him to exceed his regular mileage allowed by law."

Section 29-36 provides that game wardens "shall receive such salary, allowances, wages and expenses as may be provided in accordance with law." The appropriation for this purpose is made to the Commission of Game and Inland Fisheries. No provision is made for supplementing the salary of a game warden except in those special Acts cited in § 29-36.1 of the Code. The Act cited in the Acts of 1956, Chapter 419, page 480, amending the prior Acts, would require a county coming within the population classification contained therein to pay the game warden not less than seventy-five dollars nor more than one hundred fifty dollars per month. I do not believe that Botetourt County falls within that classification. Chapter 420 of the Acts of Assembly does not contain a provision under which any of the proceeds from the sale of stamps may be used for the purpose stated in your inquiry.

I am of the opinion that the governing body of the county has no authority to make an appropriation from the general fund for such purpose. The compensation may be paid only in accordance with § 29-36 of the Code; that is, from funds "provided in accordance with law." As previously stated, the only funds provided for this purpose are such as are appropriated to the Commission of Game and Inland Fisheries.
GAME AND INLAND FISHERIES—License—Revocation for two convictions—How prior conviction brought to attention of court.

CRIMINAL PROCEDURE—Violation of Game Laws—How prior convictions to be proved.

Honorable Chester F. Phelps
Executive Director
Commission of Game and Inland Fisheries

This is in reply to your letter of April 17, 1963, which I quote in full:

"In order for the court to revoke a person's license under the provisions of Section 29-77 of the Code of Virginia, must the warrant allege that the defendant was previously convicted of a violation of the hunting, trapping and/or inland fishing laws or regulations adopted by the Commission within a period of two years, or could the Commonwealth, after the defendant was convicted of a second offense, petition the court in which the second conviction was imposed requesting the court to revoke the defendant's license? Could the court in which such conviction was imposed receive such petition after a period of thirty days, if in a county or municipal court, and twenty-one days, if a court of record?

"It would be appreciated if you would give me your opinion as to what procedure should be followed to comply with Section 29-77 of the Code."

Section 29-77, Code of Virginia (1950), reads as follows:

"If any person be found guilty of violating any of the provisions of the hunting, trapping and/or inland fish laws and/or § 33-287 of the Code of Virginia and/or regulations adopted by the Commission pursuant thereto, a second time within two years of a previous conviction of violating any such law or regulation, the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction. If found hunting, trapping or fishing during such prohibited period such person shall pay a fine of not less than fifty dollars nor more than one hundred dollars. Licenses revoked shall be sent to the Commission."

The foregoing statute is not a criminal provision, the penalty imposed thereby being civil in nature. The revocation of the privilege to hunt or fish is a consequence of the two convictions, not a part of the punishment imposed for such violations. Such a revocation is similar to the revocation of an operator's license by the Commissioner of the Division of Motor Vehicles upon receipt of records of two or more convictions under the Motor Vehicle Code. (See, Prichard v. Battle, 178 Va. 455).

Since the revocation of the license to hunt or fish by the court is not a part of the criminal punishment, there is no reason or necessity for either alleging or proving the former conviction when prosecuting the accused on the second offense. Accordingly, I am of the opinion that it is unnecessary for the warrant in the second violation to allege the previous conviction.

The record of the previous conviction can be brought to the attention of the judge trying the accused on the subsequent offense at any time such court has jurisdiction over the case. The manner in which it is to be accomplished is not specified by statute, but I presume a form of proof satisfactory to the court would suffice to establish the fact of the previous conviction.
REPORT OF THE ATTORNEY GENERAL

GAME AND INLAND FISHERIES—License Revocation—Two violations within two years.

HONORABLE CHESTER F. PHELPS
Executive Secretary, Commission of Game and Inland Fisheries

This is in reply to your letter of August 15, 1962, in which you request my opinion as to the construction of § 29-77 of the Code of Virginia (1950), as amended, by Chapter 469 of the Acts of Assembly of 1962. You are particularly interested in knowing whether the two convictions mentioned therein must occur subsequent to the effective date of the amended section.

Section 29-77 of the Code reads, in so far as here pertinent, as follows:

"If any person be found guilty of violating any of the provisions of the hunting, trapping and/or inland fish laws, and/or § 33-287 of the Code of Virginia and/or regulations adopted by the Commission pursuant thereto, a second time within two years of a previous conviction of violating any such law or regulation, the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction.

* * *"

(Part of text in italics added)

Prior to the 1962 amendment the foregoing section provided for revocation of a license if the licensee was found guilty of violating the laws specified a second time, without any time limitation being placed on the two violations. The effect of the 1962 amendment was to place a two-year limitation on the time which could be considered when undertaking to revoke a license for two violations.

The effective date of the amended section was June 29, 1962. Any person convicted of violating the game and fish laws subsequent to that date, who had previously been convicted within two years of that date, would be subject to having his license revoked by the court trying the case.

GAME AND INLAND FISHERIES—Local Regulation—No authority in counties to enforce game laws.

COUNTIES—Game Laws—No authority in counties to enforce.

HONORABLE W. D. REAMS, JR.
Commonwealth's Attorney for Culpeper County

This is in reply to your letter of November 1, 1962, in which you request my opinion as to whether the counties are prohibited from regulating by ordinance the hunting and taking of wild animals with rifles.

I am of the opinion that unless the General Assembly has expressly conferred power upon a particular county governing body to prescribe regulations for hunting wild animals, such power does not exist. By virtue of § 29-13 of the Code of Virginia, the Commission of Game and Inland Fisheries is vested with sole jurisdiction to enforce, or cause to be enforced, all laws for the protection, propagation and preservation of game birds and animals. That Commission has been empowered to promulgate rules and regulations to determine when and by what means it is desirable to restrict, extend or prohibit the provisions of law obtaining in this State for the hunting, taking, etc., of wild animals.

Except for special acts of Assembly prescribing the type of weapon which
may be utilized in the taking of wild game, the guns which may be utilized for hunting of wild birds and wild animals in this State are specified in § 29-140 of the Code.

GAME AND INLAND FISHERIES—Seasons and Bag Limits—Statutes and regulations applicable to Smyth County.

October 1, 1962

HONORABLE ROBERT I. ASBURY
Commonwealth’s Attorney for Smyth County

This is in reply to your letter of September 25, 1962, in which you refer to the pamphlet entitled, Summary of Virginia Game Laws, which is published by the Commission of Game and Inland Fisheries, and request my opinion as to the seasons and bag limits on the taking of deer in Smyth County. Your letter reads in part as follows:

"Will you please advise whether or not the Virginia Game Laws as referred to above, permits an individual to take one deer in Smyth County during the season November 19-24 and, also, to take one deer during the Archery Season from October 15-November 1? I would also like to know whether or not, in your opinion, the referred to game laws specify two different and distinct seasons or only one season, a part of which is for Archery and the other part for other weapons."

The summary referred to is a departmental compilation of the various statutory provisions, as well as the regulations promulgated pursuant thereto by the Commission of Game and Inland Fisheries. Insofar as here material, the statutes read as follows:

"§ 29-125. Power of the Commission.—Having a due regard for the distribution, abundance, economic value and breeding habits of wild birds, wild animals, and fish in inland waters, the Commission is hereby vested with the necessary power to determine when, to what extent, if at all, and by what means it is desirable to restrict, extend or prohibit in any degree the provisions of law obtaining in this State or any part thereof for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal, or fish from inland waters and may upon its own motion or upon written petition of one hundred licensed resident landowners of any county propose regulations for such purpose."

"§ 29-129.1. Prescribing seasons and bag limits for taking fish and game.—Notwithstanding any other provisions hereafter enacted or ordained of local or special law, or any local ordinance the Commission shall have power, after careful study of each species of wild bird, animal and fish within the jurisdiction of the Commission in cities and counties of the State to prescribe the seasons and bag limits for hunting, fishing, trapping or otherwise taking such wild birds, animals and fish by regulation adopted as provided in this article. Provided that the Commission shall close Sundays or reduce the season or bag limit applicable by general law or regulation to any species in any political subdivision of the State on request of the governing body of any political subdivision of the State by resolution adopted by a majority vote of the members of such body."

Acting pursuant to the foregoing statutes, the Commission has adopted reg-
ulations prescribing the seasons and bag limits, two of such regulations reading, in part, as follows:

"1. DEER SEASON AND BAG LIMITS: The season for hunting deer shall begin the third Monday in November and run through January 5, statewide, with the following exceptions:

"(a) In the counties west of the Blue Ridge Mountains, and in Amherst west of U.S. Route 29, Bedford, Campbell, Franklin, Henry, Nelson west of Route 151, Patrick and Pittsylvania deer may be hunted from the third Monday in November for six consecutive hunting days only.

"BAG LIMITS: The lawful bag limit for deer shall be one buck a season, statewide, with the following exceptions:

"(a) One a season, either sex the first day, in the counties of Alleghany, Amherst west of U.S. Route 29, Augusta, Bath, Bedford, Bland, Botetourt, Campbell, Carroll, Clarke, Craig, Dickerson, Floyd, Franklin, Frederick, Giles, Grayson, Henry, Highland, Lee, Nelson west of Route 151, Page, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise and Wythe."

By force of the foregoing regulations, it is manifest that the Commission has prescribed the open season for taking deer in Smyth County from November 19 through November 26.

By virtue of Regulation No. 99, the Commission has prescribed the period from October 15 through November 1 for hunting squirrels, bears and deer of either sex with bow and arrow, except in localities having a closed general hunting season on deer. I am of the opinion that this period constitutes a special season for hunting squirrels, bears and deer with bow and arrow.

While the question of bag limit during this special season is not free from doubt, I believe that the limit is that prescribed in Regulation No. 1, above quoted. That regulation fixes the limit at one a season and, while arguable that the season there contemplated is the general hunting season only, I am constrained to think that it is also applicable to special seasons as well.

I am, therefore, of the opinion that an individual may take one deer in Smyth County during the special hunting season extending from October 15 through November 1, and may also take one deer during the general hunting season extending from November 19 through November 24.

GAME AND INLAND FISHERIES—Trout Fishing—When license necessary.

Honorable Chester F. Phelps
Executive Director, Commission of Game and Inland Fisheries

August 23, 1962

This is in reply to your letter of August 15, 1962, which reads as follows:

"We have had several requests from persons who are interested in conducting a trout fishing operation, usually in connection with advertising or promotion. The procedure is for a small tank to be erected in an auditorium or at a shopping center. It is stocked with captivity-raised trout supplied by the individual and the public is invited to fish either by (1) the payment of a fee for the privilege, or, (2) upon presentation of a pass issued by one of the cooperating merchants."
"We would like to have your opinion as to whether or not a permit from us is necessary for such an operation, what the license requirements might be, and whether or not season and creel limits would apply to such an operation."

The general statute requiring a license to hunt, trap or fish in this State is codified as §29-51 of the Code of Virginia (1950), and reads as follows:

"It shall be unlawful to hunt, trap or fish in or on the lands or inland waters of this State without first obtaining a license, subject to the exceptions set out in the following section."

The pertinent sections of the Code relating to the taking of fish, the open season and the bag limit for certain types of fish are §§29-148 and 29-150 of the Code of Virginia. You will note that all three sections of the Code above mentioned refer to fishing in the inland waters of the State. Inland waters have been defined by the General Assembly of Virginia in the same section of the Code which vests the power to enforce the game and fish laws in the Commission of Game and Inland Fisheries. That section reads as follows:

"The Commission is vested with sole jurisdiction, power and authority to enforce or cause to be enforced all laws for the protection, propagation and preservation of game birds and game animals of this State and all fish in the inland waters thereof, which waters shall be construed to mean to include all waters above tidewater and the brackish and fresh water streams, creeks, bays, including Back bay, inlets, and ponds in the tidewater counties, and all dog laws." (§ 29-13 of the Code)

The operation which you have set forth in your letter does not contemplate fishing in inland waters, nor does it contemplate the sale of fish. Under such circumstances, I do not believe the Game Commission has jurisdiction to issue a permit for such an operation, nor do the season and bag limit provisions of the Code apply thereto.

GARNISHMENTS—Commissions.

CIVIL PROCEDURE—Garnishments—Commission to be paid for collection.

Honorable Mervin A. Gage
City Sergeant for the City of Hopewell

This will acknowledge receipt of your letter of August 30, 1962, which reads as follows:

"We are being questioned in our office concerning the method we use in figuring our commission on garnishees.

"For a number of years, this office has been charging a commission, on the principal plus all costs. For instance if the principal is for $50.00, interest $3.00, warrant $3.75 and garnishee $5.00, we will collect a commission of $6.18. We find that there are some people who seem to be of the opinion that the commission should only be charged on the principal.

"I would appreciate it if you would give us a ruling at your earliest convenience."

I assume you have reference to a situation where the garnishee makes payment
to the officer pursuant to § 8-448 of the Code. There is a conflict between §§ 8-429 and 14-120 of the Code as to the proper basis for determining the commissions. Section 8-429 provides for a commission of five per cent and necessary expenses and costs. Section 14-120 provides for a commission of ten per cent of the first one hundred dollars of the money paid of proceeds of sale, five per cent on the next four hundred dollars, and two per cent on the residue.

Inasmuch as no sale is held where collection is made in garnishment proceedings, I am of the opinion that § 8-429 is applicable. Of course, whenever a garnishee makes payment to the court, no collection is made by the officer and his compensation is limited to the fee allowed for service of the process. This is in accord with a ruling by the Honorable Abram P. Staples during his tenure as Attorney General, copy of which opinion is enclosed. This opinion is published in the Report of the Attorney General (1942-1943), p. 248.

Whenever a collection is made by the officer, his commission, in my opinion, should be based on the amount of the debt collected, exclusive of fees. In the case presented, the commission would be a percentage of $53.00.

HEALTH—Mattresses Loaned to Indigent Hospital Inmates—§ 32-119 of Code inapplicable.

HONORABLE W. D. REAMS, JR.
Commonwealth's Attorney for Culpeper County

August 17, 1962

This is in reply to your letter of August 15, 1962, which reads as follows:

"The following situation has been reported to this office by the Health Department:

"Various non-profit charitable organizations in this and surrounding counties have been making available hospital beds and mattresses to the indigent who require such beds for treatment. These mattresses and beds are loaned to the individuals involved with the expectation of receiving them back. The mattresses have not been sterilized or disinfected after each individual use, but are merely aired and sunned. "I respectfully request your opinion as to whether or not this set of facts would violate Section 32-119 of the Code of Virginia, or whether this operation would not be deemed a disposition in a 'commercial manner.'"

By reference to § 32-126 of the Code, it will be noted that the State Board of Health is charged with the administration and enforcement of Chapter 7 of Title 32 of the Code and this section expressly provides:

"* * * It is the intention of this chapter to prevent both the manufacture and sale in this State of any articles covered by this chapter, unless manufactured and sold in conformity with its provisions. * * *"

Furthermore, § 32-119 must be read along with § 32-118 and, therefore, § 32-119 relates only to mattresses, etc., which have been manufactured, remade or renovated out of shoddy materials as defined in § 32-117.

In my opinion, the provisions of § 32-119 would not be applicable to the situation presented by you.
HEALTH—Restaurant—College fraternity house not included.

December 11, 1962

HONORABLE MACK I. SHANHOLTZ
State Health Commissioner

This is in reply to your letter of December 7, 1962, in which you request my opinion as to whether college fraternity houses fall within the definition of “restaurant” as provided in § 35-25 of the Code of Virginia, a part of Chapter 3 of Title 35 of the Code which relates to sanitary measures enforced in restaurants and public eating places.

The definition of “restaurant,” as provided in § 35-25 of the Code, reads as follows:

“(1) ‘Restaurant’ includes restaurant, coffee shop, cafeteria, short order cafe, luncheonette, hotel dining room, tavern, sandwich shop, soda fountain, and all other public eating and drinking establishments by whatever name called, including catering services, the dining accommodations of clubs, all State institutions, and schools and colleges both public and private; provided, however, this chapter shall not be construed to include facilities of public service corporations under the jurisdiction of the State Corporation Commission;”

While conceivable that a fraternity house could fall within the classification of “club,” as contemplated in the foregoing definition, I am of the opinion that such was not the intent of the General Assembly in promulgating such legislation. It is noteworthy that § 35-38 of the Code, also a portion of Chapter 3, provides in part that, among other places, “boarding houses that do not accommodate transients” are excluded from the application of the chapter.

In view of the foregoing, I am of the opinion that college fraternity houses are not included in the definition “restaurant” as provided in § 35-25 of the Code.

HIGHWAYS—Industrial Access—Authority of county to participate.

COUNTRIES—Appropriations—Authority for participating in costs of industrial access highway.

May 24, 1963

HONORABLE MARVIN G. GRAHAM
Clerk of Circuit Court for Pulaski County

This will acknowledge receipt of your letter of May 22, 1963, in which you enclosed copy of a resolution of the Board of Supervisors of Pulaski County relating to a requirement by the State Highway Commission as a condition of the construction of a proposed industrial access road at the “Project Decision” site east of the corporate limits of the town of Pulaski. This resolution states that the Department of Highways, as a condition for the construction of the industrial access road, requires the County of Pulaski to post a $15,000 cash bond conditioned upon compliance with the following:

“(1) That the property be purchased;
“(2) That the Appalachian Power Company has entered into a contract agreement for the erection of the building;
“(3) That the necessary right-of-way has been provided at no cost to the Commonwealth;
“(4) That a tenant for the building has signed a contract for occupancy.”
You have requested my opinion as to whether or not the board of supervisors has the power to comply with the conditions of the Highway Department.

This office has previously taken the position that a county may appropriate money for the purpose of acquiring a right-of-way for a road of this nature. See Opinion of Attorney General, dated December 22, 1961, published in Report of Attorney General (1961-1962), at p. 127.

Under the provisions of § 15-12 of the Code, it is our opinion that a county may make appropriations for the purpose of "securing and promoting industrial developments of such county." Such appropriation must necessarily be within the limits prescribed in said section.

The resolution under consideration is in the nature of a guarantee that the four conditions set forth above will be complied with. Otherwise, the amount posted as security for the guarantee will be defaulted.

We can find no statutory provision which, in our judgment, is sufficient to authorize a county to enter into an agreement of this nature. Therefore, we feel that there is grave doubt as to the power of the board of supervisors to enter into such an undertaking.

HIGHWAYS—Local Control—No conflict between State highway laws and sanitary district laws.

COUNTIES—Sanitary Districts—Highways—No authority for county to construct secondary system of highways.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

June 28, 1963

This is in reply to your letter of June 26, 1963, in which you present several questions relating to the authority of the Board of Supervisors to construct and maintain public roads. You are particularly interested in determining whether or not there is a conflict between §§ 33-46 and 33-138 of the Code, and the provisions of § 21-118.4(a)(b) of the Code.

As you note in your letter, § 33-46 of the Code places the control and supervision over the secondary system of State highways exclusively in the State Highway Commission. This section was a portion of the original "Byrd Road Law" (Chapter 415, Acts of 1932), and is applicable in all counties except those which exercised the option to continue the county road system (now limited to Arlington and Henrico). The authority of the local governing bodies over the secondary system is limited to the establishment of new roads (§ 33-141), participating in the costs of right of way (§ 33-141), and the abandonment of such highways as public roads (§§ 33-76.7 et seq.). Except for limited purposes mentioned in § 33-138 of the Code, the governing bodies of the several counties are precluded from laying levies for the construction and maintenance of roads. One such exception is for the purpose of supplementing State highway funds in those counties adjacent to cities of the first class.

Section 21-118.4 of the Code was enacted as Chapter 571, Acts of Assembly of 1962, the title to which reads as follows:

"An Act to amend the Code of Virginia by adding a section numbered 21-118.4, relating to creation of sanitary districts, so as to provide for certain additional powers therefor."

The powers which are enumerated in that Act of Assembly are in addition to those previously conferred by the General Assembly relating to the creation of sanitary districts. Manifestly, the primary function of a sanitary district is to provide sanitary facilities to persons within the district. The powers which have
been conferred upon the governing bodies of the several counties must be interpreted in light of the purpose for which they are granted. Obviously, the Legislature did not intend for the counties to enter into a road construction program under the guise of establishing sanitary facilities when the governing bodies were empowered to "construct, reconstruct, maintain, alter, improve, add to, and operate motor vehicle parking lots, water supply, drainage, sewerage, garbage disposal, heat, light, power, gas, sidewalk, curbs, gutters, streets and street name signs and fire fighting systems."

I am of the opinion that § 21-118.4 of the Code empowers the governing body to construct streets, parking lots, sidewalks, etc., within sanitary districts only to the extent necessary to accommodate the purpose of supplying sanitary facilities to said district.

There is no conflict between § 21-118.4 of the Code and those sections in Title 33 of the Code pertaining to the control, supervision and maintenance of the secondary system of State highways. The powers conferred upon the governing body of the county to construct streets in sanitary districts has no bearing upon the secondary system of State highways unless the governing body desires such streets to be included in the secondary system of State highways. In such event, the appropriate procedure should be followed just as is the case when other public roads are to be taken into the secondary system of State highways. Thereafter, the State Highway Commission would be solely responsible for the maintenance and supervision of such streets.

You have also requested my interpretation of the provision in § 33-138 of the Code which provides for certain counties to supplement available State funds for use on roads in the secondary system. In this regard your letter reads as follows:

"We would also like to have your opinion as to the interpretation of Section 33-138, Code of Virginia, 1950, which, as indicated, seems to authorize boards of supervisors in counties adjacent to cities of the first class to levy county or district road taxes, with the proceeds thereof to be expended at the option of the board of supervisors, either by or under the supervision of the State Highway Commissioner, for the maintenance, improvement, construction and reconstruction of roads in the suburban district mentioned in the section cited.

"Who makes the determination as to the necessity existing for the maintenance and improvements of roads? If such levy is made, must it be confined to the real estate within the district rather than in the county generally?"

The pertinent provision in § 33-138 of the Code reads as follows:

"... and provided, further, that the boards of supervisors or other governing bodies of counties adjacent to cities of the first class may, for the purpose of supplementing funds available for expenditure by the State for the maintenance and improvement of roads in such counties when such supplementary funds are necessary on account of the existence of suburban conditions adjacent to such cities, levy county or district road taxes, as the case may be, the proceeds thereof to be expended at the option of the board of supervisors or other governing body, either by or under the supervision of the State Highway Commissioner, in the maintenance and improvement, including construction and reconstruction, of roads in such suburban districts. ***

It is to be noted that the levying of taxes in those counties permitted to do so is an option with the governing body of the particular county. It necessarily follows that the determination as to the necessity existing for supplementing State highway funds for the improvement of roads in the county must be made by the governing body. Similarly, whether to lay a general county levy, or a
district levy only, is a question which must be determined by the governing body.

HIGHWAYS—Outdoor Advertising—Signs within right of way limits prohibited.

HONORABLE KENNETH P. ASBURY
Commonwealth’s Attorney for Wise County

August 15, 1962

This is in reply to your letter of August 11, 1962, in which you advised that the annual Wise County Agricultural Fair is to be held and is being advertised by the posting of signs along the highways. You have requested my opinion as to whether or not such signs may be placed within the limits of the right of way of the highways in Wise County.

Article 1, Chapter 7 of Title 33 deals with the general regulation of outdoor advertising. It provides for the licensing of persons engaged in outdoor advertising, the issuance of permits, etc.

There are certain advertisements which are exempted from the provisions of Article 1. These are enumerated in § 33-302 which provides in part:

"The following advertisements, if securely attached to real property or advertising structures, and the advertising structures, or parts thereof, upon which they are posted or displayed are excepted from all the provisions of this article save those enumerated in subsections (2), (3), (5), (6), (7) and (8) of § 33-317 and in § 33-321;
"(19) Signs advertising only the name, time and place of bona fide agricultural, county, district or State fairs, together with announcements of special events in connection therewith which do not consume more than fifty per centum of the display area of such signs, provided the person who posts the signs or causes them to be posted will post a cash bond as may be prescribed by the Commissioner, adequate to reimburse the Commonwealth for the actual cost of removing such signs as are not removed within thirty days after the last day of the fair so advertised."

I am of the opinion that signs advertising county, district or State fairs as set out above are exempted from the general regulations of the Outdoor Advertising Act contained in Article 1, Chapter 7 of Title 33 to the extent that no permit or license is required. This exemption is, of course, subject to the exceptions of § 33-321 and Subsections (2), (3), (5), (6), (7) and (8) of § 33-317.

Section 16 of the Rules and Regulations of the State Highway Commission provides:

"No advertising signs of any description shall be erected or placed within the right of way of any highway in the State Highway System. This section shall not be construed to prohibit the erection and maintenance of traffic, directional or informational signs authorized by statute or the State Highway Commission.

The Rules and Regulations of the State Highway Commission are controlling so long as they are not in conflict with the laws of the State. Since there is no law permitting the use of the rights of way of the highways for the posting of signs exempted from the General Outdoor Advertising Act under the provisions of § 33-302 (19), I am of the opinion that the right of way of the highways of this State may not be utilized for the posting of such signs.
REPORT OF THE ATTORNEY GENERAL

HIGHWAYS—Shooting in Road—When § 33-278 applicable.
CRIMES—Shooting in Road—When § 33-278 applicable.

October 1, 1962

HONORABLE DABNEY W. WATTS
Commonwealth's Attorney for the City of Winchester

This is in reply to your letter of September 27, 1962, which reads, in part, as follows:

"I shall appreciate your considering the application of Section 33-287 of the Code of Virginia of 1950 (Michie's) to the circumstances of an organization conducting supervised shooting matches.

"Section 33-287 reads:

"Shooting in or along a road or in a street—If any person shoot in or along any road, or within one hundred yards thereof, or in a street of any city or town, whether the town be incorporated or not, he shall, for each offense, be fined not less than five dollars."

The word "road", as used in this section, is defined in § 33-278, as follows:

"§ 33-278.—In this chapter, the word 'road' shall be construed to mean any State or county road."

In light of your statement that this road has a county road number, it is presumed that it is a "county road" within the meaning of that term as used in the definition cited.

It would appear, therefore, based upon the information furnished, that § 33-278 of the Code applies in this situation.

HIGHWAYS—Sidewalks—No authority for school board to contribute to cost of construction.
COUNTIES—Sidewalks Within Towns—No authority for board of supervisors or school board to contribute to cost of construction.

September 5, 1962

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of August 24, 1962, in which you request my opinion as to the authority in the County School Board or the Board of Supervisors of Loudoun County to expend funds for the construction of a sidewalk within the corporate limits of the Town of Leesburg along a street leading to the Loudoun County High School at Leesburg.

A similar inquiry was submitted to my predecessor in office with respect to a proposed street improvement adjacent to a county school within the Town of Amherst, Virginia. In a letter addressed to Division Superintendent, Tyler Fulcher, under date of September 12, 1960, the Honorable A. S. Harrison, Jr., advised that the Amherst County School Board was without authority to expend funds under its control for the purpose of improving a public road within the Town. See, Report of Attorney General, 1960-1961, p. 264.

Public sidewalks fall within the same category as the public highways in so far as construction and maintenance are involved. While the proposed improvement may be of benefit to the public school, such improvement is not
a function of the County school authorities, nor the governing body of the County. I am of the opinion that the costs of such construction must be borne by the Town of Leesburg, or the Town and the State Highway Department when acting under one of the plans available under the provisions of Title 33 of the Code of Virginia.

HIGHWAYS—Toll Revenue Bonds—When tolls to be removed.

March 28, 1963

HONORABLE H. H. HARRIS
State Highway Commissioner

This is in reply to your letter of March 25, 1963, in which you request my opinion as to whether the State Highway Commission is authorized to remove or reduce tolls on the George P. Coleman Memorial Bridge at Yorktown.

The bridge in question is one of the toll revenue facilities constructed pursuant to the State Revenue Bond Act, and more particularly authorized in subsection (2) (a) in § 33-228, Code of Virginia (1950), as amended.

The toll facilities constructed and operated by the State Highway Commission were financed by the sale of bonds which were sold after public advertisement and secured by a Trust Indenture authorized by resolution of the Commission on October 19, 1954. You, therefore, realize that any construction I may place upon that Indenture would not be binding upon the purchasers of the bonds. Since your inquiry does pertain to the authority and duties of the State Highway Commission, I shall, nevertheless, be happy to express my views.

The toll schedule on the projects is fixed pursuant to the recommendations of the Traffic Engineers employed by the Commission. This is a duty imposed upon the Commission by § 33-245 of the Code and the provisions of the Trust Indenture securing the bonds. The pertinent portion of the controlling statute reads as follows:

"The Commission shall fix and revise from time to time as may be necessary tolls for the use of each project or projects on account of which bonds are issued under the provisions of this article and shall charge and collect the same and may contract with any person, partnership, association or corporation desiring the use of such project or projects, approaches and appurtenances, and any part thereof, for placing thereon water, gas, oil pipe lines, telephone, telegraph, electric light or power lines, or for any other purpose, and may fix the terms, conditions and rates and charges for such use. Such tolls shall be so fixed and adjusted, in respect of the aggregate of tolls from the project or projects on account of which a single issue of bonds is issued under this article, as to provide a fund sufficient with other revenues of such project or projects, if any, to pay (a) the cost of maintaining, repairing and operating such project or projects unless such cost shall be otherwise provided for and (b) such bonds and the interest thereon as the same shall become due."

The statutory provision for cessation of tolls is codified as § 33-247 of the Code, which reads as follows:

"When the particular revenue bonds issued for any project or projects and the interest thereon shall have been paid, or a sufficient amount
shall have been provided for their payment and shall continue to be held for that purpose, the Commission shall cease to charge tolls for the use of such project or projects and thereafter such project or projects shall be free; provided, however, that the Commission may thereafter charge tolls for the use of any such project in the event that tolls are required for maintaining, repairing and operating such project due to the lack of funds from other sources than tolls or in the event that such tolls shall have been pledged by the Commission to the payment of revenue bonds issued under the provisions of the article for another project or projects. But any such pledge of tolls of a project to the payment of bonds issued for another project shall not be effectual until the principal and interest of the bonds issued for the first mentioned project shall have been paid or provision made for their payment.” (Italics supplied)

Originally the cost of constructing the bridge in question was financed by the sale of bonds issued in 1949. Acting pursuant to § 33-253 of the Code, the Commission issued revenue bonds in 1954 in sufficient quantity to refund the previously issued bonds and finance the construction of the additional projects authorized by § 33-228 of the Code. Thereafter, the revenue from all the projects became pledged to the payment of the principal and interest on the new bonds.

The “projects” financed by the 1954 bond issue are defined on page 23 of the Indenture as follows:

“The word ‘Projects’ shall mean, collectively, the James River Bridge, the York River Bridge, the Rappahannock River Bridge, the Hampton Roads Crossing and, until the Hampton Roads Crossing shall have been opened for traffic, the Chesapeake Ferries.”

By virtue of the foregoing statute and Trust Indenture it is readily apparent that the Commission has no authority to cease collection of tolls on any of the projects financed by the 1954 issue of bonds until the terms of the Trust Indenture and § 33-247 of the Code have been satisfied. The only exception in the Trust Indenture which recognizes the possibility of ceasing the collection of tolls prior to the payment of principal and interest on the bonds is that provision in Section 501 of the Trust Indenture on page 56 pertaining to a portion of the James River Bridges. This exception was the subject of the letter addressed to the Honorable George H. Hill by the then Attorney General on November 9, 1954. Report of the Attorney General, (1954-1955), p. 129.

As to the authority of the Commission to reduce tolls on the project in question, I am of the opinion that Section 501 of the Trust Indenture contemplates a decrease in the toll schedule, as well as an increase. No statutory provision would be violated by a reduction in the toll schedule so long as the schedule remained sufficient to satisfy the payment of the principal and interest on the bonds which remain outstanding. Since the bonds were sold on the basis of the representation contained in the Traffic Engineers’ Report and the Trust Indenture, I see no basis for objection on the part of bond holders if the Commission should reduce the toll schedule pursuant to the recommendation of the Traffic Engineers. Needless to say, such revision can be made only by strict compliance with the terms of Article V of the Trust Indenture.
REPORT OF THE ATTORNEY GENERAL

HOUSING—National Housing Act—Authority for local housing authorities to participate in Federal program.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your letter of July 16, 1962, in which you request my opinion as to whether the Alexandria Redeveloping and Housing Authority has the power to participate in the program provided in § 221(3)3 of the National Housing Act, 12 U.S.C. 1715k and 1715l.

The essence of the two sections in the Federal Act is to provide a program to assist private industry in providing housing for low and moderate income families and families displaced from urban renewal areas, or as a result of governmental action. Section 1715 l(b) authorizes the Commissioner to insure certain mortgages which are eligible for such insurance under subsequent subsections. One such mortgage under subsection (d) (3) is one executed by a mortgagor which is a public body or a political subdivision of a state.

Unquestionably, the Alexandria Redeveloping and Housing Authority is a political subdivision of the State and, in the absence of some statutory or constitutional prohibition, it would be in a position to qualify as a mortgagor on a mortgage which is eligible for insurance under the Federal Act.

Section 36-26 of the Code of Virginia provides the necessary statutory authority for housing authorities to borrow money or accept financial assistance from the Federal government, and to enter into necessary mortgages to obtain such assistance. That section reads as follows:

"In addition to the powers conferred upon an authority by other provisions of this chapter, an authority is empowered to borrow money or accept contributions, grants or other financial assistance from the federal government for or in aid of any housing project within its area of operation, to take over or lease or manage any housing projects or undertaking, within such area, constructed or owned by the federal government, and to these ends, to comply with such conditions and enter into such mortgages, trust indentures, leases or agreements as may be necessary, convenient or desirable."

HOUSING—National Housing Act—Local housing authorities—Persons entitled to lease facilities.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

This is in reply to your letter of September 12, 1962, which has further reference to my letter to you under date of August 17, 1962.

You have now asked that I amplify my previous letter in order to reply to a question raised in the letter addressed to you by Mr. Stanley King, bearing date of September 10, 1962. This question relates to the authority of the Alexandria Housing Authority to rent housing facilities to persons of low and moderate income, as contemplated in the housing program provided by Section 221 (d) (3) of the National Housing Act.

As you know, the Virginia statutory authority for the leasing of housing facilities is quite specific that the facilities be rented only to persons of low income and the rentals fixed within the financial reach of such persons of low income. The definition of "persons of low income" is found in Section 36-3(j) of the Code of Virginia, and reads as follows:

...
"Persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without crowding."

As you will observe from the foregoing definition, it is entirely conceivable that persons of moderate income within the purview of the Federal Act would, nevertheless, be persons of low income within the purview of the Virginia statute. Section 36-22 of the Code of Virginia provides a test for the selection of tenants through the use of the following language:

"(c) it shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an aggregate annual income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one; in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average annual cost (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, whether or not the charge for such services and facilities is in fact included in the rental."

So long as the foregoing test is adhered to by the Alexandria Housing Authority, I see no legal objection to participation in the program provided in the National Housing Act, even though the Federal Act authorizes the rental of facilities to families of a moderate income.

JUDGES—Retirement—Election to receive "last survivor annuity"—Not retroactive to judges retiring before effective date of legislative act.

HONORABLE SIDNEY C. DAY, JR. Comptroller

This is in reply to your letter of July 2, 1962, in which you inquire if a judge of a court of record who retired prior to December 31, 1961, may elect to receive a "last-survivor annuity."

The statutory provision which allows a judge or commissioner to elect to receive a last survivor annuity in lieu of a retirement salary first became effective on March 8, 1960, as Chapter 202, Acts of 1960. The act has no retro-active provision which would apply to retirement prior to March 3, 1960. This act is codified as § 51-28.1 of the Code of Virginia (1950), as amended, and reads, in part, as follows:

"A judge or commissioner who retires on account of age or disability may, at the time of his notifying the Governor of his retirement, elect, in lieu of the retirement salary in this chapter provided for, to receive a last-survivor annuity, which is an annuity during his lifetime and, after his death, an annuity of an equal or lesser amount to his widow during her lifetime. The annuity or annuities shall be paid in the same manner as the retirement salary."

From the foregoing quoted provision it is readily apparent that the election must be exercised at the time of notifying the Governor of retirement. The only
exception to this requirement is provided in the last paragraph of the aforementioned section of the Code which allows a period of thirty days after entry of the order retiring a judge or commissioner because of disability in which the election may be made.

JUDGES—Substitutes—Serve for same term as principal when city charter makes no express term.

July 10, 1962

HONORABLE FRED W. BATEMAN
Member of the Virginia Senate

This is in reply to your letter of July 9, 1962 in which you request my opinion with respect to a question presented by Mr. Harry E. Atkinson, of Newport News, Virginia, as follows:

"Newport News City Charter Sec. 26.01 [Chapter 141, Acts of Assembly 1958] provides for the courts not of record for our city. This section of the charter provides for the appointment of judges for 4 year terms and the provision as to substitute judges is:

"26.01 . . . There shall be a substitute judge for each court who shall have the same qualifications as the judge and who shall serve in the absence, illness or inability of the judge to serve, and shall, during the period of such service, receive such compensation as may be provided by the city council. The substitute judges shall be permitted to engage in the private practice of law.

"The council reappointed the judges for a 4 year term on 2 July, 1962.

"The city attorney has indicated that the substitute judges were not appointed for any term and they continue to serve until they resign or are removed for cause.

"Does appointment of a substitute judge of a Newport News court not of record carry a tenure of office for the lifetime of the appointee?"

The provisions of the city charter are not precise as to the duration of the term for which a substitute judge is appointed. A substitute judge is appointed for the purpose of performing active service "in the absence, illness or inability of the regular judge to serve" and this would indicate that the tenure of the substitute judge is concurrent with his principal. The charter contains nothing that would indicate the substitute judge is appointed for life.

However, under Section 33 of the Constitution, the substitute judge will continue to hold office under his original appointment until such time as his successor has been appointed and has qualified.

JUSTICE OF PEACE—Bail Bond—Officer may fix the penalty.

CRIMINAL PROCEDURE—Bail—Justice of the Peace authorized to fix penalty.

October 26, 1962

HONORABLE GERALD NOELL
Justice of the Peace

This is in reply to your letter of October 6, 1962, in which you ask to be advised if a Justice of the Peace is empowered to establish the penalty of a bail bond.
REPORT OF THE ATTORNEY GENERAL

Section 19.1-110, Code of Virginia (1950), as amended, authorizes a justice of the peace to let to bail a person charged with a misdemeanor or a felony, if only a light suspicion of guilt falls on him in the latter case. Section 19.1-127 of the Code provides that every recognizance shall be in such sum as the court or officer requiring it may direct.

In view of the foregoing, it is readily apparent that a justice of the peace has been given the authority to fix the penalty of a bail bond. I draw your attention, however, to the provisions of § 19.1-121 of the Code which empowers the judge having jurisdiction to try the case to increase the amount of bail if the amount thereof is deemed to be insufficient. That section reads as follows:

"Although a party has been admitted to bail, if the amount thereof is subsequently deemed insufficient, or the security taken inadequate, the court having jurisdiction to try the case in which the bail was required, or the judge thereof in vacation, or the officer before whom the bail was given, may increase the amount of such bail, or may require new or additional sureties therefor, or both. Any surety in a bail bond or a recognizance for the appearance of one charged with crime may take from his principal collateral or other security to indemnify such surety against liability."

JUVENILE AND DOMESTIC RELATIONS COURTS—Investigation—When report to be filed.

HONORABLE LEO P. BLAIR
Judge of the Juvenile and Domestic Relations Court,
Portsmouth

May 9, 1963

This is to acknowledge receipt of your letter of May 1, 1963, in which you request my opinion as to the time of the report of the investigation required by § 16.1-164, Code of Virginia (1950), as amended, must be filed. I quote from your letter:

"Is it necessary that the Court have this report.
"A. Before the issuance of a petition, or
"B. Is the section fully complied with if the Court has the report at any stage of the proceedings, but before the court enters a finding making a disposition of the case against the child, juvenile, or minor?"

The pertinent portion of § 16.1-164 is as follows:

"When the court receives reliable information that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law. The court may then proceed informally and make such adjustment as is practicable without a petition or may authorize a petition to be filed by any person, and if any such person does not file a petition a probation officer or police officer shall file it; but nothing herein shall affect the right of any person to file a petition if he so desires . . ." (Italics supplied).

The duty of the court is to order the investigation when it receives information
that the child or minor is within the purview of Chapter 8, Title 16.1, Code of Virginia (1950), as amended, or subject to the jurisdiction of the court. The filing of a petition is not a prerequisite to the order directing such an investigation.

I am, therefore, of the opinion that the section is complied with if the court has the report before it at any stage of the proceedings before entering a finding making disposition of the case against the child. Norwood v. City of Richmond, 203 Va. 886.

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JUVENILE AND DOMESTIC RELATIONS COURTS—Jurisdiction—Custody proceeding of child before divorce order entered.

November 30, 1962

HONORABLE W. CARRINGTON THOMPSON
Member, Virginia House of Delegates

This is in reply to your letter of November 13, 1962, which reads as follows:

"Your official opinion is requested on the following hypothetical case:
"W files suit for divorce against H and seeks custody and support for the only child C. H files Answer and Crossbill seeking divorce from W, and also asking for custody of C. The matter lies dormant in a Court of Record and no depositions are taken or Decrees entered.
"Can either H or W file a petition in the Juvenile and Domestic Relations Court seeking custody and support for C?
"As I interpret § 20-79(a) the Juvenile and Domestic Relations Court would have jurisdiction unless and until an Order is entered by a Court of Record in the divorce proceeding."

Section 20-79(a) of the Code appears in Chapter 5, Title 20 of the Code, relating to desertion and nonsupport and reads as follows:

"In any case where an order has been entered under the provisions of this chapter, directing a husband to pay any sum or sums of money for the support of his wife, or concerning the care, custody or maintenance of any child, or children, the jurisdiction of the court which entered such order shall cease and its orders become inoperative upon the entry of a decree by the court or the judge thereof in vacation in a suit for divorce instituted in any court of record having jurisdiction thereof, in which decree provision is made for alimony or support money for the wife or concerning the care, custody or maintenance of a child or children, or concerning any matter provided in a decree in the divorce proceedings in accordance with the provisions of § 20-103."

In counties having them, the juvenile and domestic relations courts shall have exclusive original jurisdiction as provided in § 20-67 in all cases arising under Chapter 5 (subject to an exception not material here), which jurisdiction shall cease whenever in a suit for divorce a decree has been entered containing the provision set forth in § 20-79(a).

Therefore, I am of the opinion that your conclusion as to the interpretation of § 20-79(a) is correct, assuming you had in mind that the decree would comply with that section.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS COURTS—Term of Office—Distinguished from tenure in office.

PUBLIC OFFICERS—Term of Office—Tenure in office distinguished.

HONORABLE JOHN D. BUCK
Commonwealth's Attorney for the City of Radford

This is in reply to your letter of October 23, 1962, in which you request my opinion relating to the office and salary of a Judge of the Juvenile and Domestic Relations Court for the City of Radford.

You advise that the term of office is to expire on November 1, 1962, and that the City Council has made a substantial reduction in the salary for this office for the forthcoming term. You also advise that Section 119 of the City charter provides that the person appointed to this office shall hold office for a term of two years and until his successor has been appointed and qualified. You present the following inquiries:

"(1) Does the Judge's term of office expire on November 1, or does it continue until his successor has been appointed and has qualified in the absence of any action by the appointing Judge?"

"(2) Does the City Council have the power or right to reduce the Judge's salary, effective November 1, if he continues to serve under his original appointment?"

I am of the opinion that the term of office for the Judge of the Juvenile and Domestic Relations Court is fixed by the City charter for two years. The fact that no new appointment may be made for the new term beginning on November first will have no legal effect upon the term which is fixed by law. While true that the present officer will continue in office until his successor has been appointed and has qualified, this fact is relative only to the tenure of office, rather than the term of office.


In reply to your second inquiry, I am of the opinion that there is no prohibition against the reduction of the salary for the Judge of the Juvenile and Domestic Relations Court for the new term commencing on November first.

JUVENILES—Abandoned Child—Disposition if juvenile court closed.

HONORABLE C. HARRISON MANN, JR.
Member House of Delegates

This will reply to your letter of July 31, 1962, in which you inquire (1) whether or not a police officer who takes an abandoned child into custody during those hours when a juvenile court is not open may deliver such child to a representative of the local department of public welfare and (2) whether or not a local department of public welfare is authorized to accept and make temporary provision for such child.
I am of the opinion that both of your inquiries should be answered in the affirmative. In this connection, § 16.1-194 (3) of the Virginia Code authorizes an officer to take a child into immediate custody when such officer "finds a child in such surroundings or condition that he considers it necessary that he take the child into immediate custody" for the welfare of the child. Moreover, § 16.1-197(3) provides that such officer "may deliver the child to a probation officer, welfare worker or police officer assigned to juvenile cases." Finally, § 16.1-202 of the Virginia Code, in pertinent part, prescribes:

"In case the local governing body shall arrange for the boarding of children temporarily detained in private homes or with any incorporated institution, society or association, the cost of maintaining such children held in boarding homes or other institutions awaiting trial or disposition under the juvenile laws of this State shall be paid monthly, according to schedules prepared and adopted by the State Board, by the State Treasurer out of funds appropriated in the general appropriation act for criminal costs."

This office has previously had occasion to rule that the above-quoted statute embraces the "temporary care of . . . children pending a hearing and disposition" rather than permanent care of children after their cases have been heard. See, Report of the Attorney General, (1949-1950), p. 182. In light of the foregoing, I am of the opinion that a police officer who takes an abandoned child into custody during those hours in which a juvenile court is not open may deliver such child to a welfare worker, and that a local department of public welfare is authorized, in cooperation with the local governing body, to arrange for the acceptance and temporary care of such child pending hearing and disposition of the matter by a juvenile court.

LABOR—Acts Designed to Injure Trade or Business—§ 59-21.1 construed.

HONORABLE ROYSTON JESTER, III
Commonwealth's Attorney for the City of Lynchburg

October 5, 1962

This is to acknowledge receipt of your letter of October 3, 1962, in which you request my opinion as to whether or not the act of distributing leaflets designed to injure the trade or business of another would constitute a violation of § 59-21.1, Code of Virginia (1950) as amended. I quote from your letter, omitting the name of the company involved:

"Recently, there has been distributed in Lynchburg a certain four page flyer entitled 'The Catalog,' which contains certain information detrimental to [X] Company. There has likewise been distributed bumper strips with the words thereon 'Please Don't Shop at Anti-Union [X] Co.'"

The aforesaid section of the Code reads as follows:

"§ 59-21.1. (a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be guilty of a misdemeanor and be punished by a fine of not
more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

"(b) This section shall not affect the right of employees lawfully to organize and bargain concerning wages and conditions of employment."

I can hardly see where prosecution under this statute of persons not employed by the said company could affect the rights of employees to lawfully organize and bargain concerning wages and conditions of employment. I am of the opinion that the circulation of these leaflets and bumper strips by two or more persons if done maliciously as a means of injuring the business or trade of the company constitutes a *prima facie* violation of this statute.

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**LABOR—Unions—Cities not required to negotiate.**

**CITIES—Employees—Right-to-Work law not applicable to public employees.**

*HONORABLE EDWARD E. WILLEY*

Member, Virginia State Senate

July 30, 1962

This is in reply to your letter of July 26, 1962, which reads as follows:

"I am sure you are aware of statements being made in the press to the effect that efforts are being made to have the City of Richmond recognize a labor union, of which some employees of the City are members, as a representative of these employees. According to these statements an agent or representative of the union seeks to negotiate with officers or agents of the City or the City Council with respect to matters relating to the employees, their employment or service.

"The Mayor of the City is concerned about the authority of officers and agents of the City and the City Council to recognize the union and to negotiate with its agent or representative, in the light of Senate Joint Resolution No. 12 agreed to February 8, 1946.

"Would you please advise me whether officers and agents of the City and City Council have any such authority."

Senate Joint Resolution No. 12, to which you refer, was agreed to on February 8, 1946, and is found in the Acts of Assembly of 1946, at page 1006. This Resolution is as follows:

"Be it resolved by the Senate of Virginia, the House of Delegates concurring, as follows:

"1. It is contrary to the public policy of Virginia for any State, county, or municipal officer or agent to be vested with or possess any authority to recognize any labor union as a representative of any public officers or employees, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service.

"2. Nothing in this resolution shall be construed to prevent employees of the State, its political subdivisions, or of any governmental agency of any of them from forming organizations, not affiliated with any labor union for the purpose of discussing with the employing agency the conditions of their employment, but not claiming the right to strike."

At the 1947 Extra Session of the General Assembly, an Act was passed, designated as Chapter 2, which reads as follows:
"Be it enacted by the General Assembly of Virginia:

"1. Section 1. It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization.

"Section 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

"Section 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

"Section 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"Section 5. No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

"Section 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of sections three, four or five or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this Commonwealth such damages as he may have sustained by reason of such denial or deprivation of employment.

"Section 7. The provisions of this act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of an existing contract.

"Section 8. If any one or more sections, clauses, sentences, or parts of this act shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions to be held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause or provision of this act in any one or more instances or circumstances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance."

This chapter is codified as Article 3 of Chapter 4 of Title 40 of the Code of Virginia, and the Code numbers run from § 40-68 through § 40-74.

You will note that on its face, Section 1 of this Act (§ 40-68 of the Code) is in apparent conflict with the resolution adopted on February 8, 1946, being Senate Joint Resolution No. 12. This apparent conflict is due to the fact that no exception as to governmental employees is contained in Section 1 of the Act of 1947. Section 6 of the Act of 1947 provides that an employer violating the terms of the Act shall be liable for any loss resulting to the employee. In the absence of language clearly stating that this provision would apply to the State and its political subdivisions, it must be presumed that it does not apply. The Supreme Court of Virginia, in the case of Wilson v. State Highway Commission, 174 Va. 82, at page 91, said "statutes in derogation of the sovereignty of the State must be strictly construed * * *."

In Sutherland Statutory Construction (3rd Ed.) Vol. 3, p. 183, we find this statement with respect to this subject:
REPORT OF THE ATTORNEY GENERAL

“General words or language of a statute that tends to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provisions or necessary implication, the sovereign remains unaffected. * * * The subdivisions of a state, including * * * cities * * * are recognized as a branch of the 'sovereign' so that they are not bound by the general language of a statute.”

In 1955, the late Honorable J. Hume Taylor, Judge of the Court of Law and Chancery for the City of Norfolk, handed down an opinion in the case of Verhaegen, et al. v. Reeder, et al., involving the right of certain firemen to join a labor union in the City of Norfolk in violation of a rule or regulation promulgated by the City Manager, in which he held that the rule was enforceable and that the Virginia Right-to-Work Act does not apply to city or state employees. From this decision the Supreme Court of Virginia denied a petition for an appeal. On the 27th day of May, 1957, the Supreme Court of the United States denied a petition for a writ of certiorari in the case. While there were no opinions issued by the Supreme Court of Virginia or the Supreme Court of the United States with respect to Judge Taylor’s decree, nevertheless, that decree was, in effect, upheld by the refusal of these two courts to review the decision.

It is my opinion, therefore, that there is no duty upon any of the officers of the City of Richmond to negotiate with a labor union. Resolution No. 12 does not prohibit officials from negotiating with labor unions but it states the policy of the State to be against negotiating with any labor union or its agents with respect to any matter relating to them or their employment or service.

LOTTERIES—Consideration—What constitutes.

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth’s Attorney for the City of Hampton

December 28, 1962

This will reply to your letter of December 12, 1962, in which you inquire whether or not a certain sales promotional program would violate the lottery laws of Virginia. Section 18.1-340 et seq., Code of Virginia (1950) as amended. As described in your communication, the program would be conducted in the following manner:

“Upon the purchase of a new motor vehicle at the regular or standard price, the invoice number of the sale is deposited in a box which is to be opened on the date of the 1963 showing of the motor vehicles involved. A number, comprised of the invoice numbers above, will be drawn out of the box and the holder will be given a 1963 automobile comparable to the one purchased the previous year. In order to get the new model it will be necessary to surrender the old model at the time the new model is delivered. There is no additional fee to enter this contest and all parties purchasing a particular make of vehicle are eligible. The winner pays nothing additional; however, he is required to surrender his old vehicle.”

In conformity with the opinion of the Supreme Court of Appeals of Virginia in Maughs v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. With respect to the element of consideration, § 18.1-340.1 of the Virginia Code prescribes:
"In any prosecution under § 18.1-340, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith." (Italics supplied).

As you point out, it is clear that the elements of prize and chance are present in the enterprise concerning which you inquire. It also appears that participation in the program is limited to persons who purchase a new automobile during a certain period, that such purchase is required to have one's invoice number deposited for drawing and that such purchase is a condition to an individual's eligibility to receive a prize. I am, therefore, of the opinion that the venture under consideration would not come within the scope of the above-quoted statute and would constitute a lottery under Virginia law. In this connection, I am forwarding to you a copy of an opinion of this office, dated July 31, 1961, to the Honorable Harold H. Purcell, Member of the Senate of Virginia, in which a similar situation was considered and discussed. See, Report of the Attorney General (1961-1962) p. 146.

I very much regret that the pressure of business on this office has prevented an earlier response to your communication.

LOTTERIES—Forfeiture—Disposition of proceeds.

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

September 17, 1962

This is in reply to your letter of September 11, 1962, in which you request my opinion as to the proper disposition of the proceeds from a sale of a motor vehicle which is condemned and forfeited to the Commonwealth as a consequence of the operation of a lottery in violation of § 18.1-340 of the Code of Virginia.

As pointed out in your letter, forfeitures incurred by violations of § 18.1-340 of the Code are enforced under Chapter 15 of Title 19.1 of the Code. While the provisions of that Chapter are quite general as to the disposition to be made of the proceeds from sales undertaken pursuant to the terms thereof, it nevertheless is quite clear that Section 134 of the Constitution of Virginia requires such proceeds to be deposited with the State Treasurer for the benefit of the Literary Fund.


HONORABLE O. NEIL HALL
Member of Town Council
Town of St. Paul

May 15, 1963

This is in reply to your letter of May 10, 1963, in which you request my opinion as to whether the Mayor of the Town of St. Paul may legally receive a salary as Police Commissioner for the Town in addition to the $900.00 annual salary as Mayor which has been fixed by the Town Council.

You advised that the Town of St. Paul was incorporated by an order of the
That Act provides, in part, that towns incorporated thereunder shall be subject in all respects to the general laws of the State governing incorporated towns. The general law relating to the election of town councils and mayors is codified as § 24-168, Code of Virginia (1950), as amended. The statute pertaining to the salaries of town mayors is § 15-420 of the Code, which reads as follows:

"The mayor shall preside over the council; and the council may direct the payment to the mayor of a salary not exceeding nine hundred dollars per annum, payable as the council may direct. Anything in the charter of any town in this Commonwealth in conflict with this provision is hereby repealed. In the event of the absence of the mayor, the council may appoint a president pro tempore. The mayor shall not receive any compensation for his services in trying violations of town ordinances or for other services rendered the town except the salary fixed by the council and all fees for such services rendered by him shall be paid into the treasury of the town."

In view of the expressed prohibition against receiving any compensation for services rendered the Town other than the salary fixed by Council, I am of the opinion that the Mayor of the Town of St. Paul may not legally receive an additional salary for services rendered the Town even though in the capacity of Police Commissioner.


HONORABLE A. E. H. RUTHERFORD
Business Manager, Department of Mental Hygiene and Hospitals

June 25, 1963

This will acknowledge receipt of your letter of June 24, 1963, in which you state that an infant child of Juliane Stewart was committed to the Lynchburg Training School & Hospital by the Fairfax County court in June, 1963. The child was born in Fairfax County on March 27, 1963. The mother was born in Hungary, had lived in Virginia for the past five years, and has applied for citizenship papers. You state that the father is unknown. You request my advice as to whether or not this child could be considered a resident of Virginia for the purpose of being admitted to Lynchburg Training School & Hospital.

The answer to your question is in the affirmative. At the time the child was born the mother was a resident of Fairfax County and, therefore, the child is a resident of Fairfax County, Virginia.

MENTAL HYGIENE AND HOSPITALS—Admissions—Residence of minor—How determined.

DR. HIRAM W. DAVIS
Commissioner, Department of Mental Hygiene and Hospitals

April 9, 1963

This will acknowledge receipt of your letter of March 6, 1963, which reads as follows:

"The question has come up as to the legal residence of a child who is mentally retarded, a child who has reached age 21. The above
patient is now at Saint Elizabeth's Hospital in Washington, D. C. where she has been since September 3rd, 1959. She was born in Cooperstown, New York on October 27th, 1937.

"The parents, Mr. and Mrs. William H. Petri, have moved to Virginia and have established residence at 308 Lynnhaven Drive, Hampton, Virginia. They have requested that their daughter be transferred from Saint Elizabeth's Hospital to Lynchburg Training School & Hospital. "Since Patricia Petri is now over 21 years old, we will appreciate your opinion as to whether or not her residence would be considered as Virginia, following that of her parents."

A person, although twenty-one years of age, who has never been mentally capable of electing to separate himself from his parents, is in the same class as an infant; that is, the law considers such person still a member of the family. An unemancipated infant, being non sui juris, cannot of his own volition select, acquire or change his domicile. The father is the natural guardian of his child. The domicile of the child, so long as it remains unemancipated, is the domicile of the father—following it as it changes. This is known as a domicile by operation of law. 32 ALR (2d) p. 861. In Re Webber's Will, 64 N.Y.S. (2d) 281, it is stated that:

"A domicile by operation of law is that domicile which the law attributes to a person independent of his actual residence. It is applicable primarily to infants and incompetents and persons who are under disabilities which prevent them from acquiring a domicile of choice."

I assume that the girl in question has never been a competent person—capable of choosing a domicile or residence. In case my assumption is correct, I am of the opinion the girl's domicile or residence followed that of her parents when they settled in Virginia. The following citations support this conclusion. In an early case from New Jersey—16 New Jersey Law Reports (Harrison), page 123, involving the question of the domicile or residence of a woman fifty-two years of age, who had always been of weak mind and classified as an idiot, it was stated:

"The very fact, that she has never been capable of electing to separate herself from her father's family, is the reason why the law considers her still a member of that family. If she had always continued a minor, she would have continued unemancipated by separation, because she was a minor, and not capable of choosing to separate herself from her father's family; and precisely for the same reason, she now remains unemancipated. In Rex v. Roach, 6 T.R. 250, the counsel put the case of an idiot, living with his father, and take it for granted he may derive a settlement let his age be what it may. This was not denied, and in a recent case, Rex v. Much Cowaine, 2 Barn & Adol. 861 (22 Eng. Com. Law R. 201) this very point was fully and solemnly ruled, in the King's Bench."

In the case of Monroe v. Jackson, Vol. 55 Maine Reports, p. 55, the question of the residence of a person non compos was involved. In that case the Supreme Court of Maine said:

"... And minor children, not emancipated, have been uniformly held incapable of acquiring in any mode a different settlement from him (father). Frankfort v. New Vineyard, 48 Maine, 565. "This condition of dependence, in ordinary cases, is considered as ceasing upon the arrival of the child at the age when the law decrees that he may be presumed capable of contracting for himself and administering his own affairs with reasonable discretion, and so he is to be
deemed emancipated upon coming to the age of twenty-one years, unless by reason of mental imbecility he is compelled still to remain dependent upon the parent for guidance and support.

"When this state of things occurs, an uninterrupted series of decisions has recognized both the rights and the duties of the parents as still continuing, and has made the settlement of the child dependent upon that of the father and liable to change only with his." (Emphasis supplied.)

"* * *

"To harmonize with our own previous decisions on these questions of settlement, we must hold that a person, non compos mentis from infancy, and not emancipated, though more than twenty-one years of age, will follow the settlement of the father with whom she resides, and cannot acquire an independent settlement by residence in a town for five successive years." (Emphasis supplied.)

In light of these authorities, in my opinion, if the father of this girl—assuming she was incompetent when she reached the age of twenty-one and has remained in that condition to the present time—brings his daughter into this State she will be entitled from the standpoint of residency to hospitalization at Lynchburg Training School & Hospital to the same extent as any other resident of this State.

MENTAL HYGIENE AND HOSPITALS—Cost of Maintenance—Board not authorized to deduct from patient's private deposits.

HONORABLE ALFRED E. H. RUTH
Business Manager, Department of Mental Hygiene and Hospitals

June 18, 1963

This is to acknowledge receipt of your letter of June 12, 1963, in which you state in part:

"The sum of $1,121.25 has been deposited to his [a patient's] private fund account at the hospital [Eastern State] and remains on deposit. The patient has no income and this represents his entire estate. No amount has been paid for his care, treatment and maintenance since his admission.

"It is the policy of the Department to reserve $750.00 of a patient's estate for emergencies or as a burial fund in such cases.

"We will appreciate your opinion as to whether or not the Superintendent of a hospital would have the authority under Sections 37-47, 37-48, 37-48.1, Code of Virginia, to expend such funds on deposit in excess of our usual reserve of $750.00 as reimbursement for costs of care, treatment and maintenance rendered the patient."

You further advise me that the funds here were deposited by an estate of an uncle of the patient for the patient's benefit; therefore, § 37-48.1 would have no application as that section pertains to the use and application of funds obtained by virtue of the Old Age and Survivors insurance provisions of the Federal Social Security Act or from any act providing retirement benefits for employees of the federal government and its agencies or from the Railroad Retirement Act. Sections 37-47 and 37-48 are as follows:

"§ 37-47.—The State Hospital Board is hereby authorized and empowered, in its discretion, to provide for the deposit with the super-
intendent or other proper officer of any hospital or colony under the supervision, management and control of the Board, of any money given or provided for the purpose of supplying extra comforts, conveniences or services to any patients therein and any money otherwise received and held from, for or on behalf of any such patient.” (Italics supplied.)

“§ 37-48.—All funds so provided or received shall be deposited to the credit of such hospital or colony in a special fund in a bank or banks designated by the Board, and shall be disbursed by the officer as may be required by the respective donors, or as directed by the superintendent.”

Such funds so provided for the patient can only be used for the purpose of supplying extra comforts, conveniences or services. It is true that § 37-48 provides that the funds shall be disbursed as required by the respective donors “or as directed by the superintendent”. The authority of the superintendent here is limited to the disbursement of the funds to supply extra comforts, conveniences or services and not to cover indebtedness of the patient to the hospital as the adjective “extra” modifies the next three succeeding nouns. Hence, the term “services” in § 37-47 means extra services; that is, those services not ordinarily supplied the patient by the hospital. There seems to be no statutory authority which would empower the superintendent to use the funds deposited by virtue of § 37-47 for general services rendered by the hospital for the care of the patient for which the patient would be liable under § 37-125.1 of the Code.

Therefore the question raised by you must be answered in the negative.

MENTAL HYGIENE AND HOSPITALS—Discharge—Effect of voluntary re-admission.

MOTOR VEHICLES—Operator’s License—When restored to person committed to mental institution.

HONORABLE HIRAM W. DAVIS, M.D.
Commissioner, Department of Mental Hygiene and Hospitals

May 9, 1963

This has reference to your letter of April 30, 1963, in which you request my view regarding a proposal of the Superintendent of Western State Hospital to discharge a patient and then re-admit the subject on a voluntary basis. You advised that the purpose in so doing is to enable the patient to obtain a motor vehicle operator’s license in order that he may be employed during the day by the Virginia Department of Highways.

By virtue of § 37-61.1 of the Code, a person may be admitted and confined in a mental institution by voluntary admittance as well as through involuntary procedures.

The general authority to discharge a person who has been committed is codified as § 37-94, of the Code, which reads as follows:

“When any person not charged with or convicted of crime, confined in a hospital or a jail under the provisions of this title shall be restored to sanity, the superintendent of any hospital or colony may discharge as improved or unimproved any patient therein if it appears to him that he will be sufficiently provided for by himself, his committee, relatives or friends and that his discharge will not be detrimental to the public, and that his detention therein is no longer necessary for his own welfare. The superintendent shall give the patient a certificate setting forth his mental condition and the cause of his discharge.”
The requirement in the Motor Vehicle Code for suspension of the motor vehicle operator's license of a person adjudged mentally ill is codified as § 46.1-427, of the Code, which reads as follows:

"(a) The Commissioner, upon receipt of notice that any person has been legally adjudged to be mentally ill, epileptic, or mentally deficient, shall forthwith suspend his license but he shall not suspend the license if the person has been adjudged competent by judicial order or decree, or discharged as recovered from an institution for the mentally ill, epileptic or mentally deficient or, having been committed as mentally ill, is found after examination to be not mentally ill.

"(b) In any case in which the person's license has been suspended prior to his release it shall not be returned to him unless the Commissioner is satisfied, after an examination such as is required of applicants by § 46.1-369, that such person is competent to operate a motor vehicle with safety to persons and property.

"(c) The clerk of the court in which any such adjudication is made shall forthwith send a certified copy or abstract thereof to the Commissioner."

While legally permissible for the Superintendent of Western State Hospital to follow the proposed procedure, it would not serve the purpose desired. Until the patient has been discharged as recovered, the Commissioner of the Division of Motor Vehicles could not restore the patient's operator's license. Thus the Superintendent could discharge the patient, but in re-admitting him as a voluntary patient it would necessarily mean that the subject has not recovered. Accordingly, I am of the opinion that the patient would not be entitled to have his driving privilege restored.

MENTAL HYGIENE AND HOSPITALS—Expense for Maintenance—Obligation may be discharged in bankruptcy.

BANKRUPTCY—Obligations for Hospital Care—Debt due State for mental care may be discharged.

November 15, 1962

HONORABLE A. E. H. RUTH
Business Manager, Department of Mental Hygiene and Hospitals

This will acknowledge receipt of your letter of November 13, 1962, in which you state as follows:

"On the 14th day of September, 1960, an Order was entered in the Circuit Court of Giles County requiring Mr. Everett C. Parcell, Narrows, Virginia, father of the above patient [Betty Jane Parcell, Southwestern State Hospital], to pay this Department $15.00 per month for his daughter's care, treatment and maintenance at Southwestern State Hospital effective June 1st, 1957. Mr. Everett C. Parcell filed a Petition in Bankruptcy on June 12, 1961, and we are advised by Judge J. T. Engleby, Jr., that a Discharge in Bankruptcy was granted August 21st, 1961. A debt due the Commonwealth of $751.76 was listed in the Petition in Bankruptcy."

You request my opinion "as to whether or not this debt, which is a result of a Circuit Court Order, can be discharged by bankruptcy and whether or not the
Order entered in the Circuit Court of Giles County on September 14th, 1960, can still be considered in effect."

Section 35 of Title 11 of the United States Code Annotated provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part * * *," subject to certain exceptions. A debt due the State of the type under consideration here is not contained in the exceptions. Therefore, assuming the debt was properly scheduled in the bankruptcy petition, in my opinion, the discharge in bankruptcy had the effect of relieving the bankrupt of the obligation mentioned by you.

MENTALLY ILL—Commitment—Fee of physician limited to $10.00.

MENTALLY ILL—Commitment for Observation—No authority to commit to private institution.

HONORABLE CHARLES A. BLANTON, II
Special Justice for Henrico County

April 29, 1963

This is in reply to your letter of April 22, 1963, in which you request my opinion on two questions raised in conjunction with commitments to State or private institutions pursuant to Chapter 3, Title 37, Code of Virginia (1950), as amended.

You ask first to be advised if the fee prescribed for the physicians in § 37-75 of the Code limits such physicians to $10.00 or simply specifies the amount the county must pay in the event the petitioner does not pay this expense.

The fees prescribed in § 37-75 of the Code are mandatory, such fees being limited to $10.00, except that the fee in the City of Richmond is fixed by the governing body in an amount not to exceed $10.00. I am aware of no provision in the law authorizing or requiring a petitioner in such proceeding to pay the physicians acting on the commission a sum in excess of $10.00.

You also ask to be advised as to whether a person may be committed to a private institution for observation.

The general provision in Chapter 3, Title 37 of the Code authorizing the commitment of any person alleged to be mentally ill is codified as § 37-61.1 of the Code. That section reads, in part, as follows:

"(a) Any person alleged or certified to be mentally ill or mentally defective and in need of institutional care and treatment, and who is not in confinement on a criminal charge, may be admitted to and confined in a State or private institution by compliance with any one of the following procedures:

(1) Voluntary admission.
(2) Commitment for observation.
(3) General commitment."

While the foregoing quoted provision contemplates admission to State or private institutions, it is necessary to comply with the statutory procedures provided in order to commit a person to an institution. The procedure prescribed for "commitment for observation" is set forth in Article 2, Chapter 3, Title 37 of the Code. There is no procedure prescribed in this article for committing a person for observation purposes to a private institution, such commitments being limited to State hospitals. Under such circumstances, I am of the opinion that a person may not be committed to a private institution for observation.
MENTALLY ILL—Jurisdiction to Determine Competency—No authority in county court.

COURTS NOT OF RECORD—No authority for adjudging competency for purposes of § 46.1-427 of the Code.

October 5, 1962

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney of Roanoke County

This is in reply to your letter of September 27, 1962, in which you make inquiry on behalf of the Judge of the Roanoke County Court as to whether the adjudication of competency for the purposes of Section 46.1-427, Code of Virginia (1950), as amended, must be made by a court of record or could be made by the judge of the county court.

An opinion of my predecessor expressing the view that jurisdiction for the purpose of adjudging a person competent is in the circuit or corporation court, but not the county court, is found in Report of the Attorney General (1960-1961), p. 86. Accordingly, I am enclosing a copy of a letter, dated October 13, 1960, to the Honorable Volney H. Campbell, Judge of the Washington County Court, which embodies that opinion. Although the question in that instance arose in connection with Section 46.1-428 relating to inebriates and users of drugs, the opinion applies as well to a judicial determination of competency where the person has been adjudged mentally ill, epileptic, or mentally deficient as contemplated by Section 46.1-427.

MENTALLY ILL—Recordation of Proceedings.

CLERKS—Recordation—Where lunacy proceedings to be recorded.

January 21, 1963

HONORABLE HARRY W. BALDWIN
Clerk, Circuit Court of Goochland County

This is in reply to your letter of January 11, 1963, which I quote in its entirety:

"It has for a good many years been the practice of this office not to accept and record lunacy commission papers in this office of commissions held on inmates at the Virginia State Farm and the State Industrial Farm for Women, which are located in our county. Under a ruling rendered June 19, 1945, by the Honorable Abram P. Staples, then Attorney General, he was of the opinion the papers should be filed in the county or city of which the committed person was a legal resident, and he further instructed Dr. H. C. Henry, Commissioner, Mental Hygiene and Hospitals, 'that he thought the Board would be justified in instructing Justices who hold commissions to adopt this instruction.' We also received a letter from Dr. Henry stating he was advising each justice wherever he holds a lunacy commission on a person who is not a resident of the county or city where the commission is held to file the Record of Proceedings, Part I, in the clerk's office of the county or city in which the person has a legal Virginia residence or settlement.

"Our County Judge is of the opinion the papers for these inmates should be filed in this clerk's office; that we make a record of same and then file with the county or city of which the inmate was a resi-
dent. We feel the Judge should file only those who have no established residence, and those out of state whose addresses are unknown, with this office and we in turn report to the commissioner and record same, also all county residence lunacy commission papers to be filed in this office. That he should himself forward the papers to the proper court of record of which the person is a resident, requesting they be filed and a report made to the Commissioner.”

In so far as I have been able to ascertain, this question has been considered by two former Attorneys General; first by Attorney General Staples [Report of Attorney General (1944-1945), p. 85], and more recently, by Attorney General Gray [Report of Attorney General (1961-1962), p. 157].

In the letter of June 19, 1945, addressed to the Commissioner of Mental Hygiene and Hospitals, Attorney General Staples expressed the view that the statute (now § 37-69, Code of Virginia) was susceptible of the interpretation desired by the Commissioner to the effect that a copy of the commitment proceeding should be filed in the clerk’s office of the county or city of the residence of the person committed. You will note that this construction by the statute was desirable for purposes of uniformity, and that the clerks generally agreed that the record should be kept in the locality from which the costs of the commission are to be paid.

Apparently the practice created a problem, due to the fact that the State is often required to pay commitment costs. In such cases, there must be certification of the proceeding to the State Comptroller. The logical officer to certify the record is the person presiding over the commitment proceeding. This apparently was not practical when the proceedings were conducted in a locality which differs from the place where the record is filed. Accordingly, Attorney General Gray rendered an opinion on August 11, 1961, to the Clerk of the Corporation Court for the City of Staunton (a copy of which is enclosed), in which he concluded that a copy of the record should be placed in the clerk’s office in the locality where the proceeding is conducted. A portion of that opinion reads as follows:

“The usual mode of commitment to a mental institution is codified as Article 1, Chapter 3 of Title 37 of the Code of Virginia. Pursuant to this article a lunacy commission is presided over by the judge specified in § 37-61 of the Code. Generally, this is the court in the locality where the subject resides, although not necessarily so. In many instances a subject may have already been institutionalized for observation at the time a commission is appointed. In other instances the subject may be a nonresident of the State. In all instances, pursuant to § 37-69 of the Code, a copy of the record of such proceedings is placed to record in the clerk’s office where deeds are recorded. I think it rather manifest that this means the court in the locality where the proceedings is conducted, not in the locality where the subject resides.”

I think there is merit in both views previously expressed. As you know, § 37-69 of the Code does not specify the locality in which the copy of the order of commitment is to be admitted to record. If we are to assume that the purpose of requiring the order to be recorded in the clerk’s office in which deeds are admitted to record is for the protection of prospective purchasers of land which may be owned by the subject committed, then I believe the view adopted by Attorney General Staples would best serve this purpose. In that event, the order of commitment would be on record in the locality of the subject’s residence, the place where he would most likely own property. If, on the other hand, the purpose in placing the copy of the order to record is to provide a repository which is readily accessible for fiscal and statistical purposes, I believe the more logical place is in the county or city wherein the proceeding is conducted. As a rule, this would likely be the locality of residence. In many cases it might
be difficult, if not impossible, to obtain certification for the payment of commitment fees and costs unless a copy of the commitment order is on record in the court which is requested to certify that such proceedings were in fact conducted.

In view of the fact that the Virginia Advisory Legislative Council is currently studying the entire field of commitment procedures, I think it may be well to reserve further construction of this statute until the Advisory Council has had an opportunity to consider clarifying legislation. For this reason, I am taking the liberty of sending a copy of this letter to the Commissioner of Mental Hygiene and Hospitals, as well as to Senator E. E. Willey, Chairman of the VALC Committee studying the laws relating to this subject.

MOTORBOATS—Registration—No provision for refunding fees.

June 26, 1963

Honorable Chester F. Phelps
Executive Director, Commission of Game and Inland Fisheries

This is in reply to your letter of June 10, 1963, in which you advise of a number of complications arising from the issuance of renewal motorboat number certificates pursuant to § 62-174.5(h) of the Code of Virginia (1950), as amended. You have requested my opinion as to whether the Commission of Game and Inland Fisheries may refund fees which have been paid by applicants for boat certificates under the following circumstances:

"Motorboat owner 'A' has filed his application for license renewal and submitted his $5.00 fee. The money was duly deposited and the renewal license issued the latter part of May, 1963. Subsequently, owner 'A' sold his boat and has applied for a refund of his $5.00 on the contention that the fee was not assessable to him until July 1, 1963, because the renewal license was not valid until that date. In other words, he had purchased a license which he is not required to have, and which he legally could not use.

"Motorboat owner 'B' did the identical thing outlined above, but realizing his error in time, directed his bank to stop payment on his check. This resulted in the Commission having issued a license for which it has collected no fee.

"Motorboat owner 'C' did the same thing as owner 'A', but realizing his error in time, requested the Commission to cancel his application and to return his check to him. The Commission was able to catch his payment prior to its being processed, and returned it to him.

"Motorboat owner 'D' received a renewal application and without checking the boat number which the application covers, returns same, together with fee. It develops he no longer owns this particular boat, it having been sold or abandoned without notice to the Commission."

At the outset, it should be pointed out that § 62-174.5(g) of the Code provides that every certificate awarded by the Commission continues in full force and effect for the period of the triennium (July 1, 1960 to June 30, 1963) unless sooner terminated or discontinued in accordance with the provisions of Chapter 11.1, Title 62. Thus, when a new three-year certificate is issued by the Commission pursuant to subsection (h), the old certificate is terminated and the boat is then registered by the new certificate which terminates on June 30, 1966, unless sooner terminated or discontinued.

By virtue of Commission Regulation 135g, there can be only one valid certificate in existence at any given time.
I have not seen the form of certificate here in question, but I presume it shows on its face the expiration date. In the event the certificate shows an effective date of July 1, 1963, then, of course, the Commission erred in issuing the certificate before that date, for, manifestly, there can be only one certificate outstanding at any given time.

Applying the foregoing to the illustrations set forth in your letter, it would appear that no refunds are due any of the applicants. By applying for new certificates they voluntarily terminated their prior certificates which otherwise would have terminated on June 30, 1963. They thereafter were operating on the renewal certificates which will not terminate until June 30, 1966.

In the case in which the applicant had disposed of the boat prior to making application for the renewal certificate, it is apparent that he violated both § 62-174.5(i) of the Code and Commission Regulation 135f, which require notification of any sale or transfer of motorboats subject to the license requirements. Consequently, I do not believe that the applicant can be heard to complain of his own mistake or wrongdoing.

There being no provision in the motorboat law for the payment of refunds by the Commission, I am of the opinion that the Commission may not refund the payments which were made for renewal certificates in the cases set forth in your letter.

MOTOR VEHICLES—Accident Report—Not required for accident occurring on private property.

June 5, 1963

HONORABLE L. HARVEY NEFF, JR.
Commonwealth’s Attorney of Grayson County

This is in reply to your letter of May 28, 1963, the factual portion of which quotes as follows:

"The following facts give rise to inquiries hereinafter made. A citizen of this County parks his car on a private parking lot of a local concern, with the permission of its owner. The lot has displayed a sign, ‘for employees only’ displayed at its entrance. The owner leaves his car and goes off on other business. While the car is so parked it is struck by a truck driven by the owner of the parking lot and does about $90.00 in damage to the automobile. The driver makes a report of the accident to the Department of Motor Vehicles. The liability carrier pays the damage in full to the automobile. It turns out, the owner of the automobile does not have liability insurance. The car owner believed he had liability insurance but due to the fact that the Company had changed agents, no policy was in force at that time. Later the owner of the automobile secures a release from the driver and owner of the truck, and also has now in force a Virginia automobile liability policy to protect him for the future. Thereafter, the Division of Motor Vehicles issues against the owner of the automobile an Order of Suspension because said automobile so involved did not have liability insurance, or had not paid the $20.00 uninsured motor vehicle fee, acting according to said Order under the authority of Sections 46.1-451 (46.1-449) and 46.1-167.4."

For the sake of clarity, I shall quote and reply to your questions severally and in order.

"(1) Section 46.1-449 provides in part, that ‘provided that the Com-
missioner shall dispense with the foregoing requirements on the part of any operator or chauffeur whom he finds to be free from any blame for such accident, and it shall be his duty to make a finding of fact when so requested by any person affected and for this purpose he shall consider the report of the investigating officer, if any, the accident reports and any affidavits of persons having knowledge of the facts. Would, under the facts stated, the Commissioner upon completion of the proper investigation be required to revoke the Order of Suspension?"

As I interpret the quoted provision of the statute, the Commissioner shall dispense with the requirements of furnishing security on the part of any operator or chauffeur whom he finds to be free from any blame for the accident. Such finding is in his discretion, subject to review, of course, by a proper court. It is my opinion, however, that the facts stated, if presented to the Commissioner in proper form, would be sufficient basis for his rescission of the suspension order previously entered under § 46.1-449, the vehicle being parked on private property under such conditions when the accident occurred.

"(2) Does the motor vehicle law extend to the operation of private parking lots not maintained by and for the use of the general public?"

If, by the term "motor vehicle law", you have reference to §§ 46.1-167.4 and 46.1-449 of the Code of Virginia, I shall answer this question in the negative. This is consistent with the view expressed in my letter of December 6, 1962, to the Honorable Marvin M. Murchison, Commonwealth's Attorney for the City of Newport News, Virginia. A copy of that opinion, relating to the requirements for reporting accidents pursuant to § 46.1-400, is enclosed for your information. Some motor vehicle laws, however, do apply to accidents occurring on private property. In that connection, your attention is invited to the provision of § 46.1-176, pertaining to the duty of a driver to stop at the scene of an accident "irrespective of whether such accident occurs on the public streets or highways or on private property."

"(3) Does the third paragraph of Section 46.1-167.3, permit the Commissioner of the Division of Motor Vehicles to dispense with invoking the provisions of Article 10, under the facts hereinbefore set forth?"

The third paragraph of § 46.1-167.3 is as follows:

"Provided that the foregoing portions of this section shall not be applicable if it is established that such owner or person had good cause to believe and did believe that such motor vehicle was an insured motor vehicle, in which event the provisions of § 46.1-59 shall be applicable."

This provision, except for the final clause, has reference to trial of the misdemeanor charges under the preceding two paragraphs of the same section of the Code, and, in that respect, is directed to the court rather than to the Commissioner. In effect, it provides that there will not be a conviction under § 46.1-167.3, of an owner who operates or permits the operation of an uninsured motor vehicle in violation of § 46.1-167.1, or of any person who certifies that an uninsured motor vehicle is insured, if it is established that such owner or person had good cause to believe and did believe that such motor vehicle was insured. The final clause, "in which event the provisions of § 46.1-59 shall be applicable", provides for the revocation of the registration and license plates because of the failure to pay the fee of twenty dollars required by § 46.1-167.1, where there was no conviction for the reasons stated. The provision for revocation of registration and license plates by the Division for failure to pay any taxes or fees required to be
collected by the Division is contained in § 46.1-59 and incorporated by reference. I shall, therefore, answer your question in the negative.

“(4) Does Article 10, of the motor vehicle code stand independently by, or, is it read in connection with the entire motor vehicle code?”

Your question obviously refers to Article 10, Chapter 4 of Title 46.1, Code of Virginia (1950), as amended, relating to the registration of uninsured motor vehicles. Since Chapter 407, Acts of 1958, which enacted this article, did not add any particular section to the Code, the Virginia Code Commission assigned to the several paragraphs of the Act, an article number and section numbers so as to codify the Act in that part of the Motor Vehicle Code relating to registration. This article is related to the remainder of the Motor Vehicle Code, especially in the respect that the uninsured motor vehicle fee prescribed therein is due and payable upon registration of the motor vehicle and the penalties for violation of the article refer to other sections of the Motor Vehicle Code. It is also related to the Motor Vehicle Safety Responsibility Act in regard to certain insurance and financial responsibility requirements. The provision in § 46.1-449 for dispensing with the requirements therein on the part of any operator or chauffeur whom the Commissioner finds “free from any blame for such accident”, however, does not control as to Article 10. Thus, the requirements of § 46.1-167.4 have equal effect regardless of whether the person so involved in a reportable accident was or was not free from any blame for such accident. It need only be determined that the accident was a reportable one.

MOTOR VEHICLES—Accident Report—Obligation to file when accident occurs in parking lot.

HONORABLE MARVIN M. MURCHISON
Commonwealth's Attorney of City of Newport News

December 6, 1962

This is in reply to your letter of November 27, 1962, in which you ask my opinion as to whether or not the laws of the Commonwealth of Virginia require a person to file an accident report, Form SR 300, when the accident occurs on private property or on a public or municipal parking lot.

Article 2, Chapter 6 of Title 46.1, Code of Virginia (1950), as amended, contains the requirements for reporting accidents. Thereunder, § 46.1-403 provides that the Division of Motor Vehicles shall prepare and upon request supply police departments, medical examiners and other suitable agencies forms for accident reports required to be made to the Division. The SR 300 is the form currently prescribed by the Division for use by any person required by law to report an accident. The requirement that a driver make a written report of certain accidents is contained in the following paragraph quoted from § 46.1-400:

“(a) The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of fifty dollars, or more, shall, within five days after the accident, make a written report of it to the Division.”

This statute is silent as to location of occurrence, requiring only that an accident be reported if it results in personal injury to or death of any person or total property damage to an apparent extent of fifty dollars or more. In the case of Prillaman v. Commonwealth, 199 Va. 401, the Supreme Court pointed out that statutes which have the same general purpose and relate to the same subject matter should be construed together. It was held that although the statute making it a crime for a person to drive a motor vehicle while his operator's
license is revoked does not specify as to location, it is construed to mean "on any highway." The suspension of an operator's license is not intended as a punishment to the driver, but is designed solely for the protection of the public in the use of the highways. Thus, where a license is required to operate upon the highway a person should not be convicted for operating a motor vehicle on private property while his license stands revoked. Consistent with such ruling, it would appear that § 46.1-400, quoted supra, has reference to accidents which arise from or are related to operation upon a highway or way open to the public for vehicular travel. Publicly maintained parking lots are included within the definition of "highway" in Section 46.1-1 (10), Code of Virginia (1950), as amended.

In consideration of the foregoing, it is my opinion that the reporting statute applies to an accident which occurs on a public or municipal parking lot. I have grave doubts, however, that the law applies to accidents which occur wholly on private property.

MOTOR VEHICLES—Arrest by members of State Police—Procedure.

CRIMINAL PROCEDURE—Arrest—Duty of officer.

HONORABLE KENNETH M. COVINGTON
Commonwealth's Attorney for Henry County

I am in receipt of your letter of March 26, 1963, in which you present the following situation and inquiry:

"A question has arisen in a criminal case involving an arrest on the charge of driving under the influence of intoxicants on which I would like to have your opinion. Briefly the facts are these. Several State Police Officers were conducting a checking detail on a highway in Henry County and one of the officers observed the accused operating a motor vehicle. The vehicle was stopped and the State Police Officer placed the accused under arrest for driving under the influence of some intoxicants or self administered drug. There were several State Police Officers in the vicinity and it became necessary for the arresting officer to turn the accused over to another State Police Officer just a few minutes after the arrest was made. The second State Police Officer had not observed the accused operating a motor vehicle, but he in turn carried the accused before a Justice of the Peace and obtained a warrant, which charged the accused with operating the vehicle while under the influence of intoxicants.

"The question has been raised, in view of Title 52-21 of the 1950 Code of Virginia, as amended, as to whether the warrant was properly issued, inasmuch as the officer who made the arrest did not carry the accused before an officer authorized to issue criminal warrants."

Pertinent to the resolution of your inquiry are §§ 52-20 and 52-21 of the Code of Virginia (1950) as amended which in part provide.

"§ 52-20.—Members of the State Police force of the Commonwealth, provided such officers are in uniform, or displaying a badge of office, may, at the scene of any motor vehicle accident, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eye-witnesses, that a crime has been committed by any person then
and there present, apprehend such person without a warrant of arrest; and such officers may arrest, without a warrant, persons duly charged with crime in another jurisdiction upon receipt of a telegram, a radio or teletype message, in which telegram, radio or teletype message shall be given the name or a reasonably accurate description of such person wanted, the crime alleged and an allegation that such person is likely to flee the jurisdiction of the Commonwealth.” (Italics supplied).

“§ 52-21.—Except in the case of a violation of a provision of Title 46.1, in which case the officer making the arrest shall proceed as provided in § 46.1-178, the officer making the arrest shall forthwith bring the person so arrested before an officer authorized to issue criminal warrants in the county or city where the arrest is made.” (Italics supplied).

The statutes quoted above were formerly paragraphs (a) and (b), respectively, of § 4827a of the Code of Virginia (1942). Prior to its amendment in 1950—Acts of Assembly (1950) Chapter 454, p. 868—§ 4827a(a) authorized members of the State police force “at the scene”, who had reasonable grounds to believe that a crime had been committed by a person then and there present, to apprehend such person without a warrant of arrest. As indicated by the language of the present statute italicized above, the 1950 amendment to § 4827a(a) limited the authority of members of the State police force to make an arrest without warrant to those officers (1) at the scene of a motor vehicle accident, (2) in the apprehension of a person charged with the theft of a motor vehicle, or (3) in the apprehension of persons duly charged with crime in another jurisdiction under specified circumstances. Moreover, I believe it is manifest from the language of the statutes under consideration and the prior legislative history of those statutes that “the officer making the arrest” specified in § 52-21 of the Virginia Code refers to the member of the State police force making an arrest in accordance with the provisions of § 52-20 of the Virginia Code.

From your communication, it would appear that the arrest which you describe was not made in accordance with the provisions of § 52-20 of the Virginia Code, as the officer making such arrest was not embraced within any of the three categories set forth in the preceding paragraph. Compare Winston v. Commonwealth, 188 Va. 386, 49 S. E. (2d) 611. I am, therefore, of the opinion that § 52-21 of the Virginia Code would not be applicable to the situation you present and that the warrant concerning which you inquire would not be invalid for failure of the arresting officer to comply strictly with the provisions of that statute. Cf., Gooch v. City of Lynchburg, 201 Va. 172, 110 S.E. (2d) 236.

MOTOR VEHICLES—Blood Analysis—Certificate of chief medical examiner admissible in evidence in any criminal proceeding.

CRIMINAL PROCEDURE—Evidence—Admissibility of certificate of chief medical examiner—§ 18.1-56 applied.

October 30, 1962

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

This will reply to your letter of October 5, 1962, in which you call my attention to the decision of the Supreme Court of Appeals of Virginia in Wade v. Commonwealth, 202 Va. 117, and the provisions of § 18.1-56 of the Virginia Code, and inquire whether or not the certificate of the Office of the Chief Medical Examiner indicating the blood alcohol content of a person charged with operating a motor vehicle while under the influence of intoxicants would be admissible at the trial of such person upon a charge of manslaughter.
In *Wade v. Commonwealth*, supra, the Supreme Court of Appeals of Virginia held (202 Va. at 122) that “the admissibility of the Chief Medical Examiner's certificate is limited to prosecution under § 18-75 [driving under the influence of intoxicants] or similar ordinance of any county, city or town.” However, as you indicate in your communication, this decision of the Virginia Supreme Court was predicated upon the language of § 18-75.2 of the Virginia Code which provided that the certificate in question should be admissible “in any court or proceeding” as evidence of the facts therein stated and the results of the analysis of the blood of the accused. Section 18-75.2 remained in effect until July 1, 1960, the effective date of the repeal of Title 18 by Chapter 358 of the Acts of Assembly (1960), at which time it was supplanted by § 18.1-56 of the Virginia Code.

Prior to the repeal of Title 18, the Virginia Code Commission considered the language of § 18-75.2 and in its report to the Governor and the General Assembly of Virginia, dated December 22, 1959, recommended that the language under consideration be changed to permit the introduction of the certificate of the Chief Medical Examiner “in any court or proceeding, civil or criminal,” as evidence of the facts therein stated and of the results of the analysis of an accused's blood sample. See, House Document No. 7 (1960) p. 27. The amendment suggested by the Virginia Code Commission would have made the copy of the Chief Medical Examiner's certificate admissible as evidence in both civil and criminal proceedings. However, as subsequently enacted, § 18.1-56 of the Virginia Code provided:

“When any blood sample taken in accordance with the provisions of § 18.1-55 is forwarded for analysis to the Office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of such vial, tube or container, the copy of such certificate as provided for in § 18.1-55 shall, when duly attested by the Chief Medical Examiner, or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated and of the results of such analysis.” (Italics supplied).

In light of the language italicized above and the prior history of the provision in question, I am of the opinion that the certificate of the Chief Medical Examiner provided for in § 18.1-55 of the Code, when duly attested by the Chief Medical Examiner or any Assistant Chief Medical Examiner, is now admissible in any court, in any criminal proceeding, and that its introduction is no longer limited to prosecution under § 18.1-54 of the Virginia Code or a similar ordinance of any county, city or town.
(1) When a person is charged with driving drunk and has a blood test, how much is he or she required to pay for this for his part of the test and how much does he send with his blood test?

Answer: Section 18.1-55(e) of the Virginia Code provides in part that all costs incident to the analysis of an accused's blood sample made by a laboratory, other than that of the Chief Medical Examiner, shall be paid by the accused. No precise amount which the laboratory selected by the accused may charge for such analysis is specified in the statute, and I am of the opinion that the amount of the fee in question is a matter wholly within the province of the accused and the laboratory he selects. Further in this connection, I am informed that the laboratories (other than that of the Chief Medical Examiner) authorized by law to analyze an accused's blood sample will send the accused a statement of the cost of such analysis and that the accused need not send any sum to such laboratory with the blood sample itself.

(2) Does a Justice of the Peace have a right to refuse to commit a person to jail when charged for driving drunk if he thinks such person is not under the influence when brought before him, a J. P., although the trooper or officer has had him arrested for some two hours and has given a blood test before bringing him to jail, although the officer swears to the warrant and says he or she was drunk at the time of the arrest?

Answer: Pertinent to the resolution of your second question are §§ 19.1-101 and 19.1-106 of the Virginia Code which, in pertinent part, respectively prescribe:

"§ 19.1-101.—The judge or justice of the peace before whom any person is brought for an offense shall, as soon as may be, in the presence of such person, examine on oath the witnesses for and against him, and he may be assisted by counsel."

"§ 19.1-106.—The judge or justice of the peace shall discharge the accused if he considers that there is not sufficient cause for charging him with the offense." (Italics supplied).

I do not believe that a justice of the peace may properly refuse to issue a warrant or commit an accused to jail simply because such justice does not think that the accused is under the influence of intoxicants at the time the accused is brought before him. However, in light of the language italicized above, I am of the opinion that a justice of the peace may discharge an accused if such justice considers that there is not sufficient cause for charging the accused with the offense of operating a motor vehicle under the influence of intoxicants at the time of the alleged offense.

(3) Can a justice of the peace take up such and such person's driving license when taking a cash bond for their appearance in court when they are from another State?

Answer: I have been unable to discover any provision of Virginia law which authorizes a justice of the peace to take away the driving license of an individual from another State who has posted a cash bond for his appearance in court.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Blood Analysis—Implied Consent—§18.1-55 construed.

HONORABLE JUNIE L. BRADSHAW
Member, House of Delegates

This will reply to your letter of August 20, 1962, in which you present certain questions involving the Virginia "implied consent" law. Section 18.1-55, Code of Virginia (1950) as amended.

In connection with your initial inquiry, I am forwarding to you a copy of an opinion of this office, dated August 8, 1962, to the Honorable Julius Goodman, Commonwealth's Attorney for Montgomery County, in which it was ruled that the results of the analysis of the blood sample given to a person arrested for operating a motor vehicle while under the influence of intoxicants and subsequently returned to the clerk of the court as prescribed in § 18.1-55(c) of the Virginia Code may be introduced in evidence on behalf of the Commonwealth.

In regard to your second question, the statute under consideration makes no provision for an accused to recover his blood sample from the clerk of the court and have it reexamined in those instances in which the results of the analysis secured by the accused from a laboratory of his choice differs from the results of the analysis made by the Chief Medical Examiner.

With respect to your concluding inquiry, I am of the opinion that no legal presumption exists that an analysis of a blood sample by the Chief Medical Examiner "carries greater value as to its accuracy" than an analysis of an accused's blood sample made by a laboratory supervised by a pathologist or approved by the State Health Commissioner.

MOTOR VEHICLES—Blood Analysis—Implied Consent—§ 18.1-55 construed.

HONORABLE RICHARD C. COTTER
Judge of the County Court of Mathews County

I am in receipt of your letter of recent date in which you present certain inquires relating to § 18.1-55 of the Virginia Code, generally known as the Virginia "implied consent" law.

Initially, you make inquiry concerning the penalty, if any, which may be imposed upon a person charged with operating a motor vehicle while under the influence of intoxicants for such person's failure to sign the declaration of refusal mentioned in § 18.1-55(g) and (h) of the Virginia Code. In this connection, I agree with the analysis set forth in your communication that the execution of the declaration of refusal form in question is procedural, that no penalty is incurred by an accused for failure to execute such form and that the warrant prescribed in § 18.1-55(h) (i) and (j) charging a violation of the statute in question is issued for failure of an accused to submit to a blood test as required by the Virginia "implied consent" law.

With respect to your second inquiry, I am forwarding to you a copy of a previous opinion of this office, dated August 24, 1962, to the Honorable Volney H. Campbell, Judge of the County Court of Washington County, in which it was ruled that no fine may be imposed for refusal to submit to a blood test in
violation of § 18.1-55 of the Virginia Code. I am of the opinion that the penalty for the refusal to submit to a blood test as required by the statute is the suspension of the accused’s license to operate a motor vehicle for the periods prescribed in § 18.1-55(j) of the Virginia Code. Finally, I concur in the view expressed in the concluding sentences of your communication that the court in which a person is found guilty of refusing to submit to a blood test in violation of § 18.1-55 may not suspend the statutory penalty prescribed in § 18.1-55(j) of the Virginia Code. In pertinent part, § 18.1-55(j) provides:

“If the court shall find the defendant guilty as charged in the warrant, then the court shall suspend the defendant’s license for a period of ninety days for the first offense, and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals and the effective dates thereof.

“The court shall forward the defendant’s license to DMV as in other cases of similar nature for suspension of license, unless, however, the defendant shall appeal his conviction, in which case the court shall return the license to defendant upon his appeal being perfected.” (Italics supplied).

I am constrained to believe that the above-quoted language is mandatory in character and that the directives contained therein must be followed by the court in which an accused is found guilty of a violation of the Virginia “implied consent” law.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Admissibility of hospital records to establish compliance.

CRIMINAL PROCEDURE—Evidence—Blood analysis—Admissibility of hospital records.

HONORABLE W. D. REAMS, JR.
Commonwealth’s Attorney for Culpeper County

May 8, 1963

I am writing in further connection with your letter of March 23, 1963, and our subsequent discussion concerning the admissibility in evidence of certain hospital records to establish compliance with the statutory procedure specified in § 18.1-55 of the Virginia Code, generally known as the Virginia “implied consent” law. You state that you wish to have the Medical Records Librarian of the Culpeper Memorial Hospital produce in court the Emergency Room records of the hospital to demonstrate such compliance, and you present the following inquiries:

“1—May the books of original entry of the hospital be used to prove that 20 c.c. of blood was withdrawn from the accused on a certain date and time by a registered nurse, etc. and that the instrument used was sterilized with a non-alcoholic substance and that the accused’s arm was likewise wiped at the place of extraction with a sterilizing agent not containing alcohol?

“2—May one loose leaf sheet of said record be produced for this purpose without producing the complete set of books?

“3—Would this excuse the nurse, etc. from being called for cross examination, or if not excused, would this render the record inadmissible?”
The question of whether or not hospital records may be introduced in evidence as an exception to the hearsay rule has been the subject of much discussion by both text writers and the courts. In 6 Wigmore on Evidence, Section 1707 (3rd Ed.), p. 36, the following views upon the propriety of admitting medical records in evidence as an exception to the above-mentioned rule are stated:

"The medical records of patients at a hospital, organized on the usual modern plan, deserve to be placed under the present principle. They should be admissible, either on identification of the original by the keeper, or on offer of a certified or sworn copy. There is a Necessity . . . ; the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness . . . ; for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the Court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists." (Italics supplied).

These views of Professor Wigmore were substantially echoed by the United States Court of Appeals for the Fourth Circuit in United States v. Wescoat, 4 Cir., 49 F. (2d) 193. In that case, medical cards attached by officials to the clothing of a member of the Armed Forces were held admissible to establish disability in an action to recover benefits on a war risk insurance policy. Having reviewed various decisions, Judge Parker, speaking for the Court, declared (49 F. (2d) at 196):

"While the case at bar differs from a number of the cases cited, in that the records there offered were business entries of a permanent nature, whereas the records here are mere cards intended to serve a temporary purpose, we think that the cases cannot be distinguished in principle. The records were admissible in those cases, not because of their form or because they related to commercial transactions, but because they were made in the ordinary course of duty under such circumstances as to preclude the probability of their being false, because they furnished the best evidence obtainable as to the matters to which they related and because of the practical necessity of their being received if any evidence relating to those matters was to be had. All of these considerations apply to the records here. If the records made by laborers as to working time, by scalers of lumber as to measurements, or by weighers as to weights of cargoes, are to be received in evidence, we see no reason for excluding records made by officials of the government in treating wounded or diseased soldiers, where in the nature of things the officials cannot be produced, or, if produced, could not give testimony as satisfactory as the records themselves. The rules of evidence are not rules of a game. Their sole purpose is to enable courts to arrive at the truth of matters under investigation. The hearsay rule is important, but courts should not hesitate to recognize exceptions to it where such exceptions fall within recognized principles and are necessary to the ascertainment of truth and the doing of justice." (Italics supplied).
In Keller v. Wonn, 140 W. Va. 860, 87 S.E. (2d) 453, the Supreme Court of West Virginia observed (87 S. E. (2d) at 460):

"This Court cannot lay down a rule that would be applicable to all entries in hospital records. Certainly, routine entries, and perhaps ordinary diagnostic findings, based upon objective data, and not presenting a question of obvious difficult interpretation, should be admitted." (Italics supplied).

In the recent case of Sims v. Charlotte Liberty Mutual Insurance Co., 256 N. C. 32, 125 S.E. (2d) 326, the Supreme Court of North Carolina had occasion to consider the question here under consideration in an action instituted by the beneficiary of a life insurance policy to recover death benefits. During the course of its opinion, the Court pointed out (125 S. E. (2d) at 328-329):

"Hospital records, when offered as primary evidence, are hearsay. However, we think they come within one of the well recognized exceptions to the hearsay rule—entries made in the regular course of business. Modern business and professional activities have become so complex, involving so many persons, each performing a different function, that an accurate daily record of each transaction is required in order to prevent utter confusion. An inaccurate and false record would be worse than no record at all. Ordinarily, therefore, records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them and before litigation has arisen, are admitted upon proper identification and authentication. Smith Builders Supply Co. v. Dixon, 246 N. C. 136, 97 S. E. 2d 767; Breneman Co. v. Cunningham, 207 N. C. 77, 175 S. E. 829; Insurance Co. v. Seaboard Air Line R. Co., 138 N. C. 42, 50 S. E. 452.

"It is a matter of common knowledge, we think, that modern hospitals are staffed by medical, surgical and technological experts who serve as members of a team in the diagnosis and treatment of human ills and injuries. The hospital record of each patient is the daily history made in the course of examination, diagnosis and treatment. The welfare, even the life of the patient, depends upon the accuracy of the record. And the records, as evidence, are more credible perhaps as to accuracy, than the independent recollection of the physicians, surgeons and technicians who make them. Motive for falsification is lacking. Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 A. 43; 26 Am. Jur., Hospitals and Asylums, s. 6, p. 590; 75 A.L.R. 1124; 13 N. C. Law Review 326; 24 Missouri Law Review 51; 58 West Virginia Law Review 76; 14 Southern California Law Review 99. On this subject Parker, J., of the United States Court of Appeals for the Fourth Circuit, delivered an illuminating opinion—United States v. Wescoat, 49 F. 2d 193.

"In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made ante litem motam. The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.

"The hospital records offered at the trial are not inadmissible as hearsay. They fall within the exception to the hearsay rule. (Italics supplied).
Finally, the position taken on the instant question in The Law of Evidence, Virginia and West Virginia, Section 150, pp. 271-272, is expressed in the following language:

"If a hospital record is properly identified, and shown to have been made, in the regular course of treatment, it may be plausibly argued that by analogy to rules governing the keeping of books and records, the same may, when properly identified and within proper limits, be admissible as to routine matters."

I have been unable to discover any decision of the Supreme Court of Appeals of Virginia in which the precise questions you present have been considered, and in the absence of such a decision, no dispositive answer to your inquiries can be given. However, the Virginia Supreme Court has clearly adopted a practical, common sense approach to related evidentiary questions and has on such occasions cited with approval the views espoused by Professor Wigmore. See, French v. Virginian R. Co., 121 Va. 383; Allen v. Commonwealth, 122 Va., 834; White S. Mach. Co. v. Gilmore Fur. Co., 128 Va. 630; duPont Co. v. Universal Moulded Prod., 191 Va. 525. In light of this circumstance and the views expressed in the decisional and text authorities analyzed above, I am constrained to believe that a hospital record—made in the regular course of hospital procedure and in accordance with an established rule of hospital administration by a person who is under a professional duty to keep an accurate record of transactions contemporaneously with their occurrence—may be admitted in evidence when properly identified and authenticated by the custodian of such records. I believe this view would be especially applicable to records which contain merely an account of regular events of hospital routine, as distinguished from items embracing professional medical opinions or diagnostic observations. Under such circumstances, it would not be necessary for the individual nurse who recorded the routine event to testify, and if the books of original entry are available in court, it would also appear that individual sheets of a loose leaf ledger may properly be introduced. Cf., White S. Mach. Co. v. Gilmore Fur. Co., supra, at 465-466.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Cost of obtaining laboratory test.

HONORABLE SAM L. HARDY
Commonwealth’s Attorney for Bland County

February 14, 1963

I am in receipt of your letter of February 7, 1963, in which you request an opinion upon the proper disposition of the following situation involving application of § 18.1-55 of the Virginia Code, generally known as the Virginia "implied consent" law:

"A citizen is arrested and charged with operating a motor vehicle while under the influence of intoxicants. At the time of the arrest he is advised by the officer as to the provisions of the law regarding blood test. The defendant consents to the blood test and accompanies the arresting officer and is given the test and samples are taken, one of which is mailed to the State Medical Examiner at Richmond and the other sample is delivered to the defendant, together with the ordinary pamphlet listing the places approved for sampling blood tests. At the time the samples were taken from the defendant he was not represented by Counsel. The defendant immediately mails his sample to an ap-
proved laboratory listed on the said pamphlet, which pamphlet did not state that any fee was required to be paid and the defendant did not know that such a fee was required to be sent to any one, and was not at that time represented by Counsel. Defendant shortly thereafter employed Counsel who appeared in court with defendant and advised the court that the sample given defendant had been so mailed and inquired if it had been sent back to the Clerk of the Court. The sample and report had not been received by the Court and the case was on motion of the defense counsel continued in order to contact the laboratory concerning the sample. Upon inquiry to the laboratory, it was learned that the sample had been held by the laboratory for some time and having no fee paid that the sample had been thereafter destroyed and could not be analyzed. Defendant testified that had he been advised of the requirement to pay a $20.00 fee for the test that he would have sent the fee with the sample."

In this connection, I call your attention to an opinion of this office, dated July 18, 1962, in which we stated that laboratories (other than that of the Chief Medical Examiner) authorized by law to analyze the blood sample of a person arrested for operating a motor vehicle while under the influence of intoxicants would send the accused a statement of the cost of such analysis and that "the accused need not send any sum to such laboratory with the blood sample itself." In a subsequent opinion, dated August 8, 1962, we pointed out:

"If the accused refuses to pay the costs of having his blood sample analyzed by the laboratory of his choice, his inability to have the benefit of the results of such analysis will be occasioned by his own failure to comply with the requirements of the statute, and this default would not preclude prosecution of the offense of driving under the influence of intoxicants. See, § 18.1-55 (f) of the Virginia Code. There is no responsibility upon officials of the Commonwealth to insure that the analysis of the sample forwarded by an accused to the laboratory of his choice is completed prior to the date of trial. However, if such analysis has not been completed because the accused has only recently been advised of the necessity of paying therefor, the trial court may grant a continuance to enable the accused to secure such an analysis."

Finally, in an opinion dated November 14, 1962, we ruled that:

"... if the results of the analysis of a blood sample of an accused are not received in evidence upon trial—after the accused has consented to the withdrawal of a sample of his blood and has not failed to comply with any provision of the Virginia 'implied consent' law—he must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants."

From your communication, it appears that the accused consented to the taking of a blood sample for chemical analysis, forwarded the same by mail to an appropriate laboratory, did not fail to comply with any provision of the statute in question and would have paid the cost of the analysis if he had been advised by the laboratory in question of the amount of the fee to be charged, as indicated in our opinion of July 18, 1962. Under such circumstances, the accused's inability to have the benefit of the results of the analysis of the blood sample given to him would not be occasioned by his own default. In light of the view expressed in the above-mentioned opinions, copies of which are enclosed, I am constrained to believe that the accused in the situation you present should be found not guilty of a violation of § 18.1-54 of the Virginia Code or a similar ordinance of any county, city or town.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Blood Analysis—Implied Consent—Costs—Source of payment.

CRIMINAL PROCEDURE—Costs—Source of payment in implied consent cases.

HONORABLE MARK D. WOODWARD
Judge of Page County Court

November 5, 1962

I am in receipt of your letter of recent date in which you advise that the County Court of Page County hears cases arising under the Virginia "implied consent" law, (§ 18.1-55, Code of Virginia (1950), as amended,) involving (1) violations of the State statute forbidding the operation of a motor vehicle while under the influence of intoxicants and (2) violations of similar ordinances of the towns of Stanley and Luray. You also call my attention to two previous opinions of this office as set forth in the Report of the Attorney General (1956-1957) pp. 66 and 80, concerning the allowance by a court of a reasonable amount from the appropriation for criminal charges under § 19-291 (now 19.1-315) of the Virginia Code to be paid to the physician, nurse or laboratory technician who withdrew the blood sample of an accused in accordance with the provisions of § 18-75.1 of the Virginia Code. In this connection, you present the following inquiries:

1. In the event of an acquittal of a Commonwealth charge, may the court order payment of the $5.00 fee from the criminal appropriation?

2. In the event of conviction of a Commonwealth charge, but the costs are not paid, may the court order payment of such fee from such appropriation?

3. In the event of an acquittal of a Town charge, may the court order said payment from said fund?

4. In the event of conviction of a Town charge, but costs are not paid, may the court order said payment from said fund?

I am of the opinion that the first and second of the above-stated questions should be answered in the affirmative. In this regard, I am forwarding to you a copy of an opinion of this office, dated July 9, 1962, to the Honorable C. H. Davidson, Jr., Commonwealth's Attorney for Rockbridge County, in which it was ruled that allowances from the appropriation for criminal charges in such cases may also be made under the provisions of § 18.1-55 of the Virginia Code. However, I am constrained to believe that no such allowance may be made out of the appropriation for criminal charges pursuant to § 19.1-315 of the Virginia Code in those instances in which an accused is charged with a violation of a town ordinance. Although I have been unable to discover any decision of the Supreme Court of Appeals of Virginia or any prior opinion of this office in which the precise questions posed in your concluding two inquiries have been considered. I am informed that the administrative interpretation placed upon § 19.1-315 by the Department of Accounts and the Auditor of Public Accounts has limited the application of the statute in question to criminal cases involving violations of State statutes and has excluded cases arising under local ordinances. In light of this long standing administrative interpretation and the uniform practice consistent therewith, I am of the opinion that your third and fourth inquiries must be answered in the negative.

Finally, in this connection, legitimate claims against the appropriation for criminal charges in accordance with § 19.1-315 of the Virginia Code are processed on Criminal Form No. 4, which form contains full instructions concerning its execution and may be obtained from the Department of Accounts, State Finance Building, Richmond, Virginia.
COUNTIES—Ordinances—Driving under influence may parallel State law—Minimum fine must be $200.

June 20, 1963

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney of Appomattox County

This is in reply to your letter of June 19, 1963, which reads as follows:

"I will very much appreciate it if you will advise me the opinion of your office on the following questions: Appomattox County has an ordinance which was passed about ten years ago, which ordinance makes it unlawful for a person to drive a motor vehicle in the County of Appomattox while under the influence of alcohol or any self-administered drug. The ordinance in general terms followed the law of the State of Virginia as it existed about ten years ago. My question is, now that the State has adopted the implied consent law, does this new State law invalidate the County ordinance and is it necessary for us to adopt a new ordinance in keeping with or parallel with the new State law? Further, I would like to know if a prosecution and conviction under the County ordinance would be valid today or should the County adopt and pass a new ordinance parallel with the present State law?"

The provisions of the implied consent statutes, as amended at the 1962 session of the General Assembly by Chapter 625, have no effect upon ordinances passed by counties pursuant to the provisions of § 15-553 of the Code. There is nothing contained in this chapter (which is codified as § 18.1-55 of the Code) that would permit a county or other local political subdivision to parallel the implied consent statutes.

It is noted that you state your ordinance relating to drunk driving was adopted about ten years ago. I assume this ordinance imposes a minimum fine of $100, which was the minimum prior to the amendment of § 18.1-58, which increased the minimum fine for drunk driving from $100 to $200. If this is true, it will, of course, be necessary for the board of supervisors for the county of Appomattox to amend its ordinance so as to provide for a minimum fine of no less than $200. In this connection, I am enclosing copy of an opinion dated August 6, 1962, addressed to the Commonwealth's Attorney of Giles County. The method of adopting the ordinance is set forth in an opinion dated March 15, 1962 to the commonwealth's attorney of Shenandoah County, published in Report of the Attorney General (1961-1962), at p. 39. I assume you have a copy of our opinions for 1961-1962.
blood test and of his duty to take the test; the driver consented to
and desired to take the test; a physician was located immediately;
the physician tried the right arm of the driver but was unable to re-
ceive any blood; the left arm of the driver was then tried without suc-
cess; the right arm was again tried without success (during these three
efforts the physician made a rather energetic effort which was very
painful to the accused who in this instance was a lady); the lady, after
the third effort under much pain, protested against so much pain and
the physician's inability to get the blood but never did refuse to give
the blood if the physician could get it. No blood was ever received
by the physician . . . ”

Pertinent to the resolution of your inquiry is § 18.1-55(f) of the Virginia Code
which, in part, provides that:

“ . . . when the person arrested within two hours of the time of
his arrest requests or consents to the taking of a blood sample for chem-
ical analysis, if the result of such chemical analysis of the blood sample
taken is not received in evidence at the trial for any reason whatever,
including but not limited to the failure on the part of any person,
except the person arrested, to comply strictly with every provision of
this section, then the rights of the person arrested shall be deemed
to have been prejudiced, and he shall be found not guilty of any of-
fense under § 18.1-54, or of any similar ordinance of any county, city
or town, and his license shall not be revoked under any provision of this
section.”

From your communication, it clearly appears that the person arrested for op-
erating a motor vehicle while under the influence of intoxicants consistently con-
sented to the taking of a sample of her blood for chemical analysis and that the
failure to obtain such a sample was not occasioned by the accused's failure to
comply with any provision of the statute in question, but simply by the inability
of the physician to obtain a sample of the accused's blood on this particular
occasion. In an opinion to the Honorable John L. Apostolou, Assistant Common-
wealth's Attorney for the City of Roanoke, dated August 27, 1962, a copy of
which is enclosed, this office ruled that if the results of the analysis of a blood
sample of an accused are not received in evidence upon trial—after the accused
has consented to the withdrawal of a sample of his blood and has not failed
to comply with any provision of the Virginia “implied consent” law—he must
be found not guilty of the offense of operating a motor vehicle while under the
influence of intoxicants. In light of the above quoted language and the views
expressed in the enclosed opinion, I am constrained to believe that the individual
concerning whom you inquire should also be found not guilty of the offense
with which she was charged.

HONORABLE WILLIAM A. JONES  January 15, 1963
Commonwealth's Attorney for Richmond County

I am in receipt of your letter of January 4, 1963, in which you request an
opinion upon the proper disposition to be made under the Virginia “implied
"Mr. A is arrested for a violation of paragraph 18.1-54 of the Code. All of the requirements of Section 18.1-55 are meticulously and precisely carried out by the arresting officer and the committing magistrate.

"Mr. A elects to have a blood analysis, the blood sample is withdrawn and one sample mailed to the chief medical examiner, the other sample together with a list of accredited laboratories is given to the defendant A as required by law and he has the sample in his possession when he is admitted to bail several hours later.

"At the trial for said violation of 18.1-54 the Commonwealth introduces all the pertinent evidence including the certificate of the blood analysis from the chief medical examiner's office. No certificate showing the blood analysis is received from any accredited laboratory to which the defendant may have sent his sample, therefore no such analysis is or can be introduced in evidence by the Commonwealth.

"At the conclusion of the Commonwealth's evidence the Commonwealth rests.

"The defense Attorney moves to strike the evidence on the grounds that the defendant has been deprived of evidence which might have resulted in an acquittal."

Pertinent to the resolution of your inquiry is § 18.1-55(f) of the Virginia Code which provides that:

"... when the person arrested within two hours of the time of his arrest requests or consents to the taking of a blood sample for chemical analysis, if the result of such chemical analysis of the blood sample taken is not received in evidence at the trial for any reason whatever, including but not limited to the failure on the part of any person, except the person arrested, to comply strictly with every provision of this section, then the rights of the person arrested shall be deemed to have been prejudiced, and he shall be found not guilty of any offense under § 18.1-54, or of any similar ordinance of any county, city or town, and his license shall not be revoked under any provision of this section." (Italics supplied).

I am of the opinion that the motion in question should be denied. The offense defined by § 18.1-54 of the Virginia Code is that of driving or operating an automobile or other motor vehicle while under the influence of alcoholic intoxicants or drugs. The disposition by an accused of the blood sample given to him as required by the Virginia "implied consent" law is not an essential element of the offense with which he is charged, and it is not necessary for the prosecution to establish such disposition to make out its case against the accused. See, Report of the Attorney General (1959-1960) pp. 117-118.

This office has ruled that if the results of the analysis of a blood sample of an accused are not received in evidence upon trial—after the accused has consented to the withdrawal of a sample of his blood and has not failed to comply with any provision of the Virginia "implied consent" law—he must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants. However, the burden of demonstrating that he consented to the withdrawal of a blood sample and that he has not failed to comply with any provision of the statute under consideration rests with the accused, and this burden must be discharged by the accused in support of his motion to dismiss the prosecution or to strike the evidence of the Commonwealth. In this connection,
§ 18.1-55(c) of the Virginia Code prescribes that the accused or his attorney shall deliver the accused’s blood sample to a laboratory supervised by a pathologist or approved by the State Health Commissioner to be tested. To be entitled to a dismissal of a prosecution under § 18.1-54, it is incumbent upon an accused to establish that he does not have the results of the analysis of his blood sample, that he complied with all the requirements of § 18.1-55 and that the inability to have the benefit of the results of such analysis was not occasioned by his own default. In the absence of evidence demonstrating that his inability to present the results of such test was not caused by a failure on his part to comply strictly with every provision of the Virginia “implied consent” law, an accused is not entitled to a dismissal of such prosecution under the terms of § 18.1-55(f) of the Virginia Code.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Failure to show return address of court on sample.

CRIMINAL PROCEDURE—Blood Analysis—Effect of failure to show return address of court on blood sample.

HONORABLE E. G. SHAFFER
Commonwealth's Attorney for Wythe County

February 19, 1963

This will reply to your letter of February 15, 1963, in which you make inquiry concerning the proper disposition under the Virginia “implied consent” law (§ 18.1-55 of the Virginia Code) of a situation in which the blood sample container “which is delivered to the accused does not have shown thereon the return address of the Court in which the matter is heard and is in blank when delivered to the accused.”

In this connection, I am of the opinion that the failure of the arresting officer or other accompanying official to insert on the accused’s blood sample container the name of the court and the county or city in which the accused will be tried does not relieve the accused of the duty of forwarding the container to an appropriate laboratory for analysis. See, § 18.1-55(c). While the statute directs that the certificate (of the private laboratory selected by the accused) showing the results of the analysis of the accused’s blood sample shall be returned to the clerk of the court in which the matter will be heard, there is no statutory requirement that the identity and location of the court in question shall be inserted on the container by the arresting officer or other accompanying official. The practice of having such information placed on the container by the arresting officer or other accompanying official is an administrative procedure recommended by this office to further the effective operation of the Virginia “implied consent” law and is not an obligation imposed by the statute under consideration. The private laboratory selected by the accused may itself ascertain the identity of the court in which the matter will be heard and return its certificate showing the results of the analysis of the accused’s blood sample to the clerk of that court. In such event, no right secured to the accused by the Virginia “implied consent” law will be infringed.

You also make inquiry concerning the appropriate disposition of a situation in which the blood sample containers contemplated by the statute have been resealed in the presence of the accused, but the fact of such resealing has not been affirmatively brought to the accused’s attention.

While § 18.1-55(c) directs that the blood sample container in question shall be resealed in the presence of the accused after calling the fact to his attention, I am constrained to believe that the statute contemplates that this act should be performed by the physician, nurse or laboratory technician who withdrew the
blood sample rather than by the arresting officer or other accompanying official. I do not believe that the failure of such physician, nurse or laboratory technician to call the fact of resealing to the accused's attention constitutes a failure on the part of "the Commonwealth" within the scope of the terminal sentence of § 18.1-55(f), nor a variation from the prescribed procedure which is sufficiently substantial to compel a dismissal of a prosecution for operating a motor vehicle while under the influence of intoxicants. It does not appear that the rights of an accused would be prejudiced—or, indeed, affected in any way—by the failure on the part of the physician, nurse or laboratory technician to comply with this directive of the statute. In such circumstances, I am of the opinion that the situation you present falls within the ambit of two previous rulings of this office, dated July 17, 1962, and October 8, 1962, in which similar questions were discussed and decided adversely to dismissal on the basis of the decision of the Supreme Court of Appeals of Virginia in McHone v. Commonwealth, 190 Va. 435, 57 S.E. (2d) 109. A copy of each of these opinions is enclosed.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Fees may be required before making analysis—Procedure when accused is indigent.

Honorable Russell M. Carneal
Member, House of Delegates

May 31, 1963


Initially, you call my attention to that part of § 18.1-55(c) which provides that "the certificate attached to the [blood sample] container forwarded by or on behalf of the accused shall be returned to the clerk of the court in which the matter will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner." In light of the above-quoted language, you inquire whether or not an individual charged with operating a motor vehicle while under the influence of intoxicants is required to pay a fee in advance to the private laboratory supervised by a pathologist or approved by the State Health Commissioner to which the accused sends his blood sample for analysis.

Section 18.1-55(e) of the Virginia Code provides in part that all costs incident to the analysis of an accused's blood sample made by a laboratory, other than that of the Chief Medical Examiner, shall be paid by the accused. In this connection, I am forwarding to you a copy of an opinion of this office, dated July 18, 1962, in which it was stated that the amount of the fee here under consideration is a matter wholly within the province of the accused and the laboratory he selects. Moreover, we pointed out that laboratories (other than that of the Chief Medical Examiner) authorized by law to analyze an accused's blood sample will send the accused a statement of the cost of such analysis and that the accused need not send any sum to such laboratory with the blood sample itself. However, the Virginia "implied consent" law does not require private laboratories to analyze an accused's blood sample in the absence of payment of costs as required by § 18.1-55(e), and I am of the opinion that such laboratories may properly require payment of their prescribed fees before making such analysis.

With respect to your additional inquiry, I am of the opinion that an indigent accused who cannot afford to pay for an analysis of his blood sample by a private laboratory may be tried on the basis of other available evidence. In this con-
nection, the accused would be entitled, upon request and without prepayment of costs, to obtain the results of the chemical analysis of his blood sample made by the office of the Chief Medical Examiner, although an amount not to exceed five dollars to cover the costs of taking his blood sample will be taxed as part of the costs of the criminal case if the accused is convicted. In light of this circumstance, I am of the opinion that the inability of an indigent accused to have an analysis of his blood sample made by a private laboratory of his choice would not preclude his prosecution for the offense of operating a motor vehicle while under the influence of intoxicants.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Localities may not adopt parallel law.

COUNTIES—Ordinances—No authority to adopt implied consent law.

HONORABLE THOMAS E. WARRINER, JR.
Commonwealth's Attorney for Brunswick County

December 17, 1962

This will reply to your letter of recent date in which you present several questions concerning the Virginia "implied consent" law. Section 18.1-55, Code of Virginia (1950), as amended.

Initially, I am of the opinion that § 15-553 of the Virginia Code authorizes the governing bodies of the various political subdivisions of the State to enact ordinances prohibiting the operation of motor vehicles while under the influence of intoxicants within such political subdivisions, but does not authorize enactment of an "implied consent" law by such local governing bodies.

In connection with your second inquiry, I am forwarding to you a copy of an opinion of this office, dated August 6, 1962, to the Honorable Robert L. Powell, Commonwealth's Attorney for Giles County, in which it was ruled that a local ordinance of the type under consideration "would have to be amended providing a minimum fine of $200.00 in order to be effective, and that until such ordinance is amended to make it comply with § 18.1-58, no prosecution should be held thereunder."

The fact that the governing body of a county has enacted an ordinance prohibiting the operation of motor vehicles while under the influence of intoxicants does not prevent prosecution in the county court of such locality for violation of § 18.1-54 of the Virginia Code.

Finally, I am of the opinion that refusal to submit to a blood test constitutes a violation of § 18.1-55 of the Virginia Code, which violation should be charged upon a State warrant. In this connection, I am forwarding to you a copy of an opinion of this office, dated July 17, 1962, to the Honorable W. D. Reams, Jr., Commonwealth's Attorney for the County of Culpeper, in which it was ruled that the court "in which the offense of driving under the influence" will be tried is the court in which the offense of refusing to take a blood test in violation of § 18.1-55 should be tried. In light of the language quoted and the view expressed in the first question of the enclosed opinion, we have recommended that, in those instances in which an accused refuses to submit to a blood test and is charged with a violation of § 18.1-55 of the Virginia Code, the offense of driving under the influence of intoxicants should be charged as a violation of § 18.1-54 of the Virginia Code, rather than as a violation of the ordinance of a town which would be tried by a court of limited jurisdiction.
MOTOR VEHICLES—Blood Analysis—Implied Consent—Not applicable to persons operating motorboats.

CRIMINAL PROCEDURE—Evidence—Implied consent law not applicable to motorboat offenses.

MOTORBOATS—Blood Analysis—Implied Consent—Not applicable to persons operating motorboats.

March 25, 1963

HONORABLE JUNIE L. BRADSHAW
Member of House of Delegates

In response to your inquiry of March 20, 1963, I am of the opinion that the provisions of § 18.1-55 of the Code of Virginia (1950), as amended, generally known as the Virginia "implied consent" law, would not be applicable to persons operating motor boats or power boats on waters within the Commonwealth of Virginia.

December 6, 1962

HONORABLE JUNIE L. BRADSHAW
Member House of Delegates

I am in receipt of your letter of recent date in which you enclosed a copy of a letter to you from Mr. Richard L. Jones, formerly Commonwealth's Attorney of Colonial Heights, Virginia, concerning the appropriate interpretation to be accorded the phrase "graduate laboratory technician" as that phrase appears in § 18.1-55(c) of the Virginia Code.

Section 18.1-55 of the Virginia Code comprises what is generally known as the Virginia "implied consent" law. With respect to the taking of a blood sample for analysis to determine its alcoholic content, § 18.1-55(c) in pertinent part provides:

"Only a physician, registered professional nurse or graduate laboratory technician, using some type of a cleanser or sterilizer for the instruments used and for the part of the body from which the blood is taken, other than alcohol or other substance which might in any way affect the accuracy of the test, shall withdraw blood for the purpose of determining the alcoholic content therein; . . ."

Limitations upon the class of persons who might withdraw blood samples in cases involving prosecutions for operation of a motor vehicle while under the influence of intoxicants first appeared in Chapter 557 of the Acts of Assembly of 1956. Acts of Assembly (1956) Chapter 557, p. 912; § 18-75.1, Code of Virginia (1950), as amended. Initially, these limitations were expressed in the following language:

"Only a physician, nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein."
Subsequently, the provision quoted immediately above was amended by Chapter 358 of the Acts of Assembly of 1960. Acts of Assembly (1960) Chapter 358, p. 426; § 18.1-55, Code of Virginia (1950), as amended. In its amended form the provision in question prescribed:

"Only a physician, registered professional nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein." (Italics supplied).

With the enactment of the Virginia "implied consent" law by Chapter 625 of the Acts of Assembly of 1962, the provision in question was again amended and the word "graduate" was specifically inserted as a qualification upon the term "laboratory technician" which appeared in previous statutes.

Since the Commonwealth of Virginia does not formally accredit schools for laboratory technicians as such, and does not license laboratory technicians, I am constrained to believe that the phrase under consideration should be given that interpretation which is customarily accorded it by the medical and hospital administration professions with which laboratory practice is associated. I am informed that, in such professions, a graduate laboratory technician is one who has graduated from a school approved by the American Society of Clinical Pathology, who has registered with the Society and who is entitled to use the designation "M.T. (ASCP)". While there are undoubtedly many laboratory technicians who by reason of their training and experience are qualified laboratory technicians, they are not deemed graduate laboratory technicians unless they have met these requirements.

I am, therefore, of the opinion that a "graduate laboratory technician," as that phrase is utilized in § 18.1-55(c) of the Virginia Code, is one who qualifies under the above enunciated definition.

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**MOTOR VEHICLES—Blood Analysis—Implied Consent—Person refusing to submit to test assessible for costs in prosecution.**

**October 9, 1962**

**HONORABLE CHARLES G. STONE**
Commonwealth's Attorney for Fauquier County

I am in receipt of your letter of October 1, 1962, in which you pose certain questions relating to § 18.1-55 of the Virginia Code, generally known as the Virginia "implied consent" law.

In connection with your first inquiry, I am forwarding to you a copy of a previous opinion of this office to the Honorable William H. Hodges. Member of the House of Delegates, dated August 20, 1962, in which the question you present was considered and discussed.

With respect to your second inquiry, it is clear from the provisions of § 18.1-6 and § 18.1-55(h), (i) and (j) of the Virginia Code that refusal to submit to a blood test as prescribed in § 18.1-55 is an offense which constitutes a misdemeanor. I am, therefore, of the opinion that the usual costs assessable in misdemeanor cases should be assessed against an individual who has been found guilty of refusing to submit to a blood test in violation of § 18.1-55 of the Virginia Code. See, § 14-132, Code of Virginia (1950), as amended.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Blood Analysis—Implied Consent—Procedure to be employed in taking sample.

CRIMINAL PROCEDURE—Blood Analysis—Implied Consent—Procedure for taking blood sample discussed.

Honorable William G. Hartwell
Justice of the Peace for Bedford County

November 14, 1962

I am in receipt of your letter of November 2, 1962, in which you present several inquiries concerning § 18.1-55 of the Virginia Code, generally known as the Virginia "implied consent" law. These questions will be stated and considered seriatim.

"(1) and (4). When the subject is committed does he take a sample of blood with him to his cell or leave it with the Jailer with his personal effects?"

Answer: While an accused may be permitted to take his blood with him to his cell, he may also leave the sample among his personal effects with the jailer. If the latter procedure is followed, it is recommended that the list of the accused's personal effects show that such container, together with a copy of the instructions regarding it, was received by the jailer and returned to the accused upon his release.

"(2). If he is permitted to take the sample of blood with him, what happens if he accidentally breaks the sample, or does it on purpose?"

Answer: In this connection, § 18.1-55(c) of the Virginia Code prescribes that an accused, or his attorney, shall deliver the blood sample given to the accused, either by transporting or by mailing, to a laboratory supervised by a pathologist or approved by the State Health Commissioner for testing. If an accused breaks the container with his blood sample, whether accidentally or deliberately, his inability to have the benefit of the results of an analysis of such sample will have been occasioned by his own failure to comply with the requirements of the statute in question, and this default would not preclude prosecution of the offense of driving under the influence of intoxicants. See, § 18.1-55(f) of the Virginia Code.

"(3). If within an hour and fifty-nine minutes he decides to take the blood test and calls for the jailer and is not heard and relates this situation to the court, what happens?"

Answer: I regret that no dispositive answer to this inquiry can be given. Section 18.1-55(f) of the Virginia Code provides that if an accused at first refuses to submit to a blood test, but subsequently "and within two hours of the time of arrest" requests that a blood sample be taken, he "shall be entitled to the benefit of such test." In the situation you present, the applicability of this provision of the statute would depend upon a consideration of all the circumstances surrounding the manner in which the accused's request was made following a lapse of one hour and fifty-nine minutes after the time of his arrest.

"(5). Is the jailer or the arresting officer supposed to take him to the hospital, etc. for the blood to be withdrawn?"

Answer: Either the arresting officer or the jailer may take the accused to a hospital to have a sample of the accused's blood withdrawn. If an accused makes appropriate request for a blood test within two hours of the time of his arrest, § 18.1-55(b) provides:
"It then shall be the duty of the arresting officer, or whoever has custody of the person arrested at the time such request is made, forthwith to carry the person arrested to a person qualified under this section to withdraw the blood sample." (Italics supplied).

"(6). Does the refusal of a subject to take the blood test automatically revoke his license or does it constitute grounds. It seems to me that his refusal would constitute the grounds for revocation."

Answer: The refusal of an accused to submit to a blood test in accordance with the provisions of the Virginia "implied consent" law constitutes grounds for the suspension of his license to operate a motor vehicle. In this connection, an accused who refuses to submit to a blood test should be charged—by a warrant issued in accordance with the provisions of § 18.1-55(h)—with a violation of § 18.1-55 of the Virginia Code. If such accused is subsequently found guilty as charged in the warrant, § 18.1-55(j) directs that:

"...the court shall suspend the defendant's license for a period of ninety days for the first offense, and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals and the effective dates thereof."

"(7). On the refusal form there is a place for a witness to sign. Does the arresting officer or some individual sign as a witness?"

Answer: The arresting officer should sign the declaration of refusal form. In this connection, I am forwarding to you a copy of a memorandum previously issued by this office, paragraph 11 of which specifically states the view expressed above.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Refusal to take test
When justified—Right to prosecute on basis of other evidence.

HONORABLE SAM L. HARDY
Commonwealth's Attorney for Bland County

May 23, 1963

This will reply to your letter of May 2, 1963, describing a situation in which an individual is arrested between midnight and daybreak for operating a motor vehicle while under the influence of intoxicants. The accused initially consents to submit to a blood test under the Virginia "implied consent" law but refuses to accompany the arresting officer some twenty-three miles to the nearest physician, nurse or laboratory technician qualified to withdraw a sample of the accused's blood for chemical analysis. You inquire (1) whether or not the accused may legally refuse to submit to a blood test under such circumstances and (2) whether or not the accused may be prosecuted upon the basis of other available evidence.

With respect to your first inquiry, § 18.1-55(b) of the Virginia Code provides that if a person arrested for operating a motor vehicle while under the influence of intoxicants consents to submit to, or requests, a blood test, it is the duty of the arresting officer, or whoever has custody of the accused at the time the request is made forthwith to carry the accused to a person qualified to withdraw a sample of the accused's blood. In light of this provision, I think it is clear that the consent contemplated by the statute under consideration includes a willingness on the part of the person arrested to accompany the appropriate officer to a physician, nurse or laboratory technician qualified to withdraw a blood sample. I am constrained to believe that, in the situation you present, the accused may not properly refuse to accompany the arresting officer to the nearest
person qualified to withdraw his blood sample at the time the consent is given
or the request is made and that such refusal by the accused vitiates the consent
initially given.

With regard to your second inquiry, if the accused refuses to accompany the
arresting officer, no blood sample will be taken and the accused's inability to have
the benefit of the results of such analysis will have been occasioned by his own
failure to comply with the requirements of the Virginia "implied consent" law,
and this default would not preclude prosecution for the offense of driving under
the influence of intoxicants. In such a situation, the Commonwealth would pro-
ceed with the prosecution on the basis of such other admissible evidence as it
may have which tends to establish the guilt of the accused.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Refusal to submit to
test.

HONORABLE VOLNEY H. CAMPBELL
Judge, County Court of Washington County

This will reply to your letter of August 18, 1962, in which you present certain
questions involving the Virginia "implied consent" law. Section 18.1-55, Code of
Virginia (1950), as amended. These questions will be stated and considered
seriatim.

"1. If a person refuses to take the blood test and a separate warrant
is issued for this offense, is it proper to require the defendant to make
bond for his appearance in Court on that charge? This would, of course,
be in addition to any bond which may be required on the warrant
charging driving under the influence."

Answer: Refusal to submit to a blood test in violation of § 18.1-55 of the Vir-
ginia Code constitutes an offense which is separate and distinct from that of
operating a motor vehicle while under the influence of intoxicants in violation of
§18.1-54 of the Virginia Code or a similar ordinance of any county, city or town.
Moreover, trial of an individual for the former offense must take place subsequent
to such person's trial for the offense of driving under the influence of intoxicants.
I am, therefore, of the opinion that it would be permissible to require a person
charged with a violation of § 18.1-55 to post bond for his appearance in court
on such charge, in addition to any bond which may be imposed for his appearance
on other charges.

"2. If a cash bond is posted on the charge of refusing to take the test,
what disposition should be made of the cash bond after the case is heard,
assuming that the defendant is found guilty on this warrant? As I
read the statute, the only punishment the Court can give is to suspend
the operator's license for the required period of time and I find no
provision for assessing any fine to which the cash bond could be applied.
In this connection, it would also be appreciated if you would advise
definitely whether or not I am correct in my interpretation of the
statute that no fine can be assessed."

Answer: If the accused appears, the cash bond should be returned to him or to
the person posting the same; if the accused fails to appear, the bond is forfeited
as any other bond. In this connection, I concur in your view that no fine may be
imposed for refusing to submit to a blood test in violation of § 18.1-55 of the
Virginia Code.
"3. If a non-resident of the State of Virginia is charged with refusing to take the blood test and is found guilty at the subsequent hearing, what would be the proper judgment to enter? Sub-Section J of the statute referred to states that the Court 'shall suspend the defendant's license ...' for the period set out and forward it to the Division of Motor Vehicles. In other cases where non-residents are involved the statutes usually refer both to the operator's license and to the operating privilege in the State of Virginia. The specific inquiry here is whether a judgment could be entered in the case of a non-resident suspending his operating privileges in this state for the required period of time, even though he may retain his foreign operator's license."

Answer: It is manifest from the initial sentence of § 18.1-55(b) of the Virginia Code that the Virginia "implied consent" law applies to any person who operates a motor vehicle upon a public highway in this State, regardless of whether or not such person is licensed by Virginia. Section 18.1-55(j) provides that when a person is found guilty of refusing to submit to a blood test in violation of the statute under consideration, the court "shall suspend the defendant's license" for a specified period of time and "shall forward the defendant's license" to the Division of Motor Vehicles as in other cases of a similar nature involving the suspension of licenses. Since a non-resident defendant is not "licensed" to drive in Virginia, but merely has the privilege of operating a motor vehicle within this State, I am constrained to believe that the appropriate judgment to be entered in instances of the type you describe would be an order suspending the non-resident defendant's privilege of operating a motor vehicle in this State, rather than an order suspending such defendant's license. Finally in this connection, I am of the opinion that the court should forward to the Division of Motor Vehicles an abstract of the record in such cases as prescribed by §§ 46.1-412 and 46.1-413 of the Virginia Code, rather than the non-resident defendant's license which has been issued in another State.

"4. In the event a subject may post a cash bond for his appearance on the charge of refusing to take the blood test and does not appear on the date of trial, what would be the recommended procedure for picking up his operator's license?"

Answer: In such instances, I am of the opinion that the court should forward to the Division of Motor Vehicles an abstract of the record in the case as prescribed by §§ 46.1-412 and 46.1-413 of the Virginia Code. I am informed that, upon receipt of such abstract unaccompanied by the defendant's license, the Division of Motor Vehicles will cause the defendant's license to be taken up, in accordance with the consistent administrative practice of that department in cases of a similar nature involving the suspension of licenses.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Time within which blood test to be made.

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

October 31, 1962

I am in receipt of your letter of October 22, 1962, describing a situation in which a person is arrested for operating a motor vehicle while under the influence of intoxicants some four hours after the time of the alleged offense. Although advised by the arresting officer that he need not submit to a blood test under the Virginia "implied consent" law because he was not arrested within
two hours of the alleged offense, the accused requested that a blood test be made. See, § 18.1-55, Code of Virginia (1950) as amended. He was subsequently taken to a hospital where a sample of his blood was drawn and forwarded to the office of the Chief Medical Examiner. No blood sample was given to the accused to be analyzed by an approved laboratory of his choice.

With respect to the two inquiries you present concerning the situation described above, I am forwarding to you a copy of an opinion of this office, dated July 17, 1962, to the Honorable W. D. Reams, Jr., Commonwealth's Attorney for the County of Culpeper, in which it was ruled that if a person accused of operating a motor vehicle while under the influence of intoxicants is not arrested within two hours of the alleged offense, the provisions of § 18.1-55 of the Virginia Code would not be applicable and such person would neither be deemed to have consented to, nor be entitled to, have a sample of his blood taken to determine the alcoholic content in compliance with the provisions of the statute under consideration. In light of this ruling, I am of the opinion that the provisions of the concluding paragraph of § 18.1-55(f) would not be applicable in the situation you outline and that the failure to furnish the accused with a sample of his blood would not affect his subsequent prosecution.

Moreover, as the accused in the situation you present was not arrested within two hours of the alleged offense, the certificate of the Chief Medical Examiner indicating the accused's blood alcohol content would not be admissible in evidence under the provisions of § 18.1-56 of the Virginia Code. Section 18.1-56 provides for the admission in evidence of the certificate of the Chief Medical Examiner only when such certificate is made up as provided in § 18.1-55 and relates to a blood sample taken in accordance with the provisions of § 18.1-55 of the Virginia Code. However, I am constrained to believe that the results of such test would still be admissible if such results could be established by competent testimony of the State Toxicologist or Assistant State Toxicologist who caused the blood sample in question to be analyzed for its alcoholic content.

Finally, I concur in the view expressed in the terminal paragraph of your communication that if a person is arrested for operating a motor vehicle while under the influence of alcoholic intoxicants one hour and fifty-nine minutes from the time of the alleged offense and makes request for a blood test one hour and fifty-nine minutes from the time of his arrest, a blood sample may be taken in conformity with the provisions of § 18.1-55 of the Virginia Code more than four hours from the time of the alleged offense.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Variance in result of analysis.

CRIMINAL PROCEDURE—Evidence—Blood Analysis—Effect of variance in results of blood sample analysis.

HONORABLE J. VAUGHAN BEALE
Commonwealth's Attorney for Southampton County

December 11, 1962

I am in receipt of your letter of December 3, 1962, in which you call my attention to § 18.1-55 of the Virginia Code, generally known as the Virginia "implied consent" law, and present the following situations and inquiries:

"On two occasions defendants have come in the Southampton County Court and tendered guilty pleas to warrants charging them with violation of Section 18.1-54 of the Code. In both of these cases there was quite a variance in the chemical analysis of the accused's blood as determined by the office of the Chief Medical Examiner and the labora-
tory approved by State Health Commissioner. Inasmuch as no attorney represented the defendants I requested the Southampton County Court to find the two accused guilty of reckless driving and the court followed my suggestion.

"Further, the Obici Memorial Hospital, Suffolk, Virginia, on one occasion failed to forward the container, with certificate attached, to the Clerk of the Southampton County Court. The hospital returned the certificate, but made no mention of the container. It is my position that it is not the duty of the Commonwealth to produce the container, with the certificate attached, which was made available to the accused at the time of his arrest.

"It will be appreciated if you will advise me if I was correct in recommending to the Judge of the Southampton County Court that he find the two accused guilty of reckless driving. I would also like to know if it is the responsibility of the Commonwealth to see to it that the laboratory returns the container, with certificate attached, to the Clerk of the County Court."

With regard to your first inquiry, I do not believe that the mere fact of variance in the results of the chemical analyses of the two blood samples prescribed by the statute in question would compel a recommendation to the court that an accused be found guilty of reckless driving rather than convicted of a violation of § 18.1-54 of the Virginia Code, especially in those instances in which an accused has pled guilty to the latter offense. I am informed that judgments of conviction have been entered throughout the Commonwealth in numerous cases in which a variance in the results of such analyses existed. Of course, in any criminal prosecution you may make such recommendation to the court as you feel is justified, and your decision in this regard would depend upon a consideration of all the facts and circumstances of the individual case.

With respect to your second inquiry, I am forwarding to you a copy of a memorandum of the Office of the Chief Medical Examiner, dated June 18, 1962, which was distributed to the various private laboratories qualified to analyze the blood sample of an accused under the Virginia "implied consent" law. As you will note, the third paragraph of this memorandum relates to the certificate indicating the results of the analysis of the blood sample of an accused and, in part, directs:

"A copy must be made and attested by the pathologist and returned with the blood tube inside the mailing container to the clerk of the court where the matter will be heard."

I am of the opinion that care should be taken to insure that the laboratory personnel of the hospital mentioned in your communication comply with these directions. In this connection, § 18.1-55(c) of the Virginia Code provides that:

"... all procedures established herein for use in transmittal, testing and admission of results in trial of the case for the sample sent to the Chief Medical Examiner shall apply to sample sent by or on behalf of the accused to an approved testing laboratory... and the certificate attached to the container forwarded by or on behalf of the accused shall be returned to the clerk of the court in which the matter will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner."

Moreover, § 18.1-56 of the Virginia Code supplements the provisions of § 18.1-55(c) and prescribes:

"When any blood sample taken in accordance with the provisions of
§ 18.1-55 is forwarded for analysis to the Office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of such vial, tube or container, the copy of such certificate as provided for in § 18.1-55 shall, when duly attested by the Chief Medical Examiner, or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated and of the results of such analysis.” (Italics supplied).

If the court in which an alleged violation of § 18.1-54 is tried should admit the certificate of the private laboratory without the accompanying container, no rights of the accused will be prejudiced. If, however, the court should exclude such certificate because it is not attached to the container, an accused who has submitted to a blood test and complied with all the requirements of the Virginia “implied consent” law may be deprived of the results of the chemical analysis of his blood sample through no act or default of his own. In this connection, this office has ruled that if the results of the analysis of a blood sample of an accused are not received in evidence upon trial—after the accused has consented to the withdrawal of a sample of his blood and has not failed to comply with any provision of the Virginia “implied consent” law—he must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants.

HONORABLE RUSSELL M. CARNEAL
Member House of Delegates

I am in receipt of your letter of November 8, 1962, in which you call my attention to certain provisions of § 18.1-55 of the Virginia Code, generally known as the Virginia “implied consent” law, and present the following situation and inquiry:

“Mr. ‘A’ was arrested in City ‘X’ and charged with being drunk in public, reckless driving and driving under the influence of intoxicants. He readily submitted to a blood test and was given his sample by the arresting officer. He immediately mailed his sample to a laboratory approved by the State Health Department for analysis. Upon receipt of the container, still sealed, the hospital informed him that no analysis could be made due to the fact that the contents of the tube had leaked out during transit and it was impossible to perform an analysis for him.

“In light of these facts and applying them to Section 18.1-55 and more particularly to paragraph (f) of that Section, would you give me your opinion as to whether or not this is an act on the part of a person other than the accused to prejudice the rights of the accused to the extent that he should be found not guilty under Section 18.1-54, or any similar ordinance.”

In pertinent part, § 18.1-55(f) of the Code of Virginia (1950) as amended, provides:

“... when the person arrested within two hours of the time of his
arrest requests or consents to the taking of a blood sample for chemical analysis, if the result of such chemical analysis of the blood sample taken is not received in evidence at the trial for any reason whatever, including but not limited to the failure on the part of any person, except the person arrested, to comply strictly with every provision of this section, then the rights of the person arrested shall be deemed to have been prejudiced, and he shall be found not guilty of any offense under § 18.1-54, or of any similar ordinance of any county, city or town, and his license shall not be revoked under any provision of this section."

(Italics supplied).

In the situation you present it appears that the accused consented to the taking of a blood sample for chemical analysis, forwarded such sample by mail—without delay and without tampering of any kind—to an appropriate laboratory and did not fail to comply with any provision of the statute in question. Under such circumstances, the accused's inability to have the benefit of the results of the analysis of the blood sample given to him would not be occasioned by his own default.

In this connection, I am forwarding to you copies of two previous opinions of this office, dated August 27, 1962, and October 8, 1962, in which this office ruled that if the results of the analysis of a blood sample of an accused are not received in evidence upon trial—after the accused has consented to the withdrawal of a sample of his blood and has not failed to comply with any provision of the Virginia "implied consent" law—he must be found not guilty of the offense of operating a motor vehicle while under the influence of intoxicants.

In light of the language of the statute italicized above and the views expressed in the enclosed opinions, I am constrained to believe that the accused in the situation you present should be found not guilty of a violation of § 18.1-54 of the Virginia Code or a similar ordinance of any county, city or town.

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MOTOR VEHICLES—Blood Analysis—Implied Consent—When applicable, venue for offenses, and failure to comply with § 18.1-55.


HONORABLE W. D. REAMS, JR.
Commonwealth's Attorney for the County of Culpeper

July 17, 1962

I am in receipt of your letter of July 2, 1962, in which you present several inquiries concerning § 18.1-55 of the Code of Virginia (1950) as amended, generally known as the Virginia "implied consent" law. These questions will be stated and considered seriatim.

(1) In the event that a person is involved in an accident while driving under the influence in this county and receives injuries therein, and he is subsequently taken to a hospital outside of this county and there refuses to submit to a blood test, signing a declaration in that foreign county, what is the venue of the offense of refusing to submit to a blood test?

Answer: The court in which the offense of driving under the influence of intoxicants will be tried. Section 18.1-55(g) and (h) of the Virginia Code provides, inter alia, that (1) if a person arrested for operating a motor vehicle while under the influence of intoxicants refuses to permit a sample of his blood to be taken for an alcohol determination and so declares his refusal in writing upon a
form provided by the committing justice, then no blood sample shall be taken and (2) the committing justice shall then issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood with a violation of § 18.1-55, such warrant to be executed as any other criminal warrant. Further in this connection, § 18.1-55(i) and (j) provides:

"(i) The executed declaration of refusal or certificate of the committing justice shall be attached to the warrant, as the case may be, and shall be forwarded by the committing justice to the court in which the offense of driving under the influence will be tried.

"(j) When the court receives the certificate of refusal referred to in paragraph (i), together with the warrant charging the defendant with violation of § 18.1-55, the court shall fix a date for the trial of said warrant at such time as the court may designate, but subsequent to the defendant's trial for driving under the influence of intoxicants. If the court shall find the defendant guilty as charged in the warrant, then the court shall suspend the defendant's license for a period of ninety days for the first offense, and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals and the effective dates thereof." (Italics supplied).

In light of the language italicized above, I am of the opinion that the court "in which the offense of driving under the influence" will be tried is the court in which the offense of refusing to take a blood test in violation of § 18.1-55 should be tried.

(2) In a similar accident situation does the statute requiring that the arrest be made within two hours bar a prosecution in the event that a law officer from this county does not get to the accused in the foreign county within two hours of the alleged offense?

Answer: No. In this connection, the initial sentence of § 18.1-55(b) provides that:

"Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-two, shall be deemed thereby to have agreed as a condition of such operation to consent to, and shall be entitled to, have a sample of his blood taken for a chemical test to determine the alcoholic content thereof if he is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense and in compliance with all the provisions of §§ 18.1-55 through 18.1-59."

If an accused is not arrested for violation of § 18.1-54 or a similar ordinance of any county, city or town within two hours of the time of the alleged offense, the provisions of § 18.1-55 of the Virginia Code would not be applicable, and an accused would neither be deemed to have consented to, nor be entitled to, have a sample of his blood taken to determine its alcoholic content in compliance with the provisions of the statute under consideration. See, Report of the Attorney General (1959-1960), p. 115. In such instances, the Commonwealth would proceed with the prosecution on the basis of such other admissible evidence as it may have which tends to establish the guilt of the accused.

(3) If the accused is unconscious throughout a two-hour period from the time of the alleged offense is he deemed to have given his permission for a blood sample to be taken during that time under the implied consent law and thereby allow the sample to be taken?
Answer: No. I am of the opinion that the statute in question does not contemplate that a blood sample shall be taken unless an accused expressly agrees or requests that such sample be taken.

(4) When a blood sample is taken in accordance with provisions of the consent law and the accused is not capable of receiving his sample thereof at the time the blood is drawn and the arresting officer is unable to find the accused to deliver his sample within 24 hours, through the use of due diligence, does this constitute such a state of facts as would require a dismissal of the operating charge?

Answer: No. In this connection, an analogous situation under § 18-75.1 (now § 18.1-55) of the Virginia Code was considered and discussed at length in an opinion, dated August 31, 1956, to the Honorable Carter R. Allen, Commonwealth’s Attorney for the City of Waynesboro. See, Report of the Attorney General (1956-1957), p. 169. On that occasion, the following question was presented:

“If as a result of some oversight by the officer the specific directives of Code Section 18-75.1 are not completely complied with does this defeat the Commonwealth in prosecuting the charge?”

In response to the above-quoted inquiry, this office stated, (Report of the Attorney General, supra, p. 171):

“With respect to the effect which a failure of the arresting authorities to follow the specific directives of Section 18-75.1 would have upon an ensuing criminal trial, I am of the opinion that if such failure has the effect of depriving an accused of admissible evidence which would or might have been in his favor, a judgment of conviction could not stand and the prosecution would be dismissed. See, Winston v. Commonwealth, 188 Va. 386, 49 S.E. (2d) 611. On the other hand, in those instances in which it could be established that the evidence of which an accused claims to have been deprived would not have been in the accused’s favor, a different question is presented. The critical consideration with respect to this latter question is whether or not a showing of specific prejudice is necessary before an accused is entitled to a ruling in his favor on a motion to dismiss the prosecution upon the ground that the accused has been deprived of his right to call for evidence in his favor. Constitution of Virginia, Section 8. This consideration was left open by the Supreme Court of Appeals of Virginia in the Winston case, the Court being of the opinion that, as the evidence of the results of a blood analysis in that case might have supported the accused’s claim of innocence, such prejudice was manifest. See, Winston v. Commonwealth, supra, at 396, 49 S.E. (2d) at 616.

“However, in McHone v. Commonwealth, 190 Va. 435, 57 S.E. (2d) 109, the Court held that the failure of the arresting authorities to take an accused before a judicial officer without unnecessary delay did not deprive the accused of the right to call for evidence in his favor in violation of Section 8 of the Virginia Constitution, as the evidence in that case tended to show that the defendant would not have attempted to obtain an analysis of his blood and thus had not been deprived of material evidence in his favor. I am constrained to believe that the decision in the McHone case lends some support to the view that if the Commonwealth can establish that the accused has not been prejudiced by a failure of an official to properly perform his statutory duty, such failure would not have the effect of defeating the prosecution. As the Court observed in the McHone case, supra, at 444, 57 S.E. (2d) at 114:
The conviction of a defendant does not lack due process of law merely because the Commonwealth's officer has failed to perform his legal duty in dealing with him after his arrest. * * * His wrongful act should not deprive the Commonwealth of its right to enforce its penal laws unless it is made reasonably clear that such wrongful act has in fact invaded the defendant's constitutional rights and deprived him of evidence material in his defense which he would otherwise have obtained. The rights of the public, represented by the Commonwealth, and the rights of the citizen are both to be regarded and, if possible, kept in balance. * * *"

"In this case we hold that it has not been shown that the officers' acts deprived the defendant of material evidence, * * ."

"In view of the question reserved in the Winston case, I am unable to furnish a dispositive response to your concluding question. However, I am of the opinion that if it can be established that the failure of an official to perform his duties has not deprived an accused of evidence material to his defense which he would otherwise have obtained, such failure to act would not have the effect of defeating the Commonwealth's prosecution."

In situations of the character described in your concluding inquiry, I am of the opinion that the arresting officer should deliver the blood sample in question, together with a copy of the "Instructions Regarding Blood Sample" form, to the accused as soon as is reasonably possible, even though such delivery cannot be made within the twenty-four hour period specified in the statute. The above-mentioned form advises the accused that such blood sample should be taken or mailed—without delay and without tampering of any kind—to one of the laboratories listed on the form. If the accused follows these instructions, the results of the analysis of his blood sample can be obtained and presented in evidence even though the sample was not delivered to him within the statutory period, and the accused will not be prejudiced in any way by the unavoidable delay. On the other hand, if the accused fails or refuses to forward the blood sample to a laboratory authorized by law to examine it, his inability to have the benefit of the results of an analysis by the laboratory he selects will have been occasioned by his own default. I am of the opinion that, in the latter instance, the inability of the accused to have the benefit of such blood analysis would not preclude prosecution for the offense of operating a motor vehicle while under the influence of intoxicants.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Who to explain law to accused.

HONORABLE J. T. CAMBLOS
Commonwealth's Attorney for the City of Charlottesville

I am in receipt of your letter of September 14, 1962, describing a situation in which a person arrested for operating a motor vehicle while under the influence of intoxicants in violation of § 18.1-54 of the Virginia Code was taken to a police station where the provisions of the Virginia "implied consent" law were explained to him by the "Lieutenant in Charge" rather than the arresting officer. From your communication, it appears that the individual in question refused to submit to a blood test as required by § 18.1-55 and was subsequently taken before a committing justice, at which time he signed the "Declaration of Refusal to Permit Taking of Blood Sample" form prescribed by § 18.1-55(g) of
the Virginia Code. With respect to this situation, you present the following inquiry:

"Did the fact that the statutory provisions were explained by an officer, other than the arresting officer, constitute such failure to comply with the statute as would entitle the accused to be found not guilty in the subsequent prosecution under Section 18.1-54?"

I am constrained to believe that your inquiry should be answered in the negative. While it appears from the language of § 18.1-55(g) of the Virginia Code that the statute in question contemplates that "the arresting officer" shall advise the person arrested of the requirements of the Virginia "implied consent" law, I do not believe that the variation from the prescribed statutory procedure in the situation you present would be sufficiently substantial to compel a dismissal of the prosecution for operating a motor vehicle while under the influence of intoxicants. It does not appear that the rights of the individual concerning whom you inquire were prejudiced—or, indeed, affected in any way—by the fact that explanation of the statutory requirements was given to him by the "Lieutenant in Charge" rather than the immediate arresting officer. Moreover, after refusing to submit to a blood test, the accused was taken to a committing justice, at which time the demands of the Virginia "implied consent" law were again explained to him by that official and a proper declaration of refusal was executed by the accused in due course. In such circumstances, I am of the opinion that the situation you present falls within the ambit of the previous ruling of this office to the Honorable W. D. Reams, Jr., Commonwealth's Attorney for the County of Culpeper, dated July 17, 1962, in which a similar question was discussed at length and decided adversely to dismissal on the basis of the decision of the Supreme Court of Appeals of Virginia in McHone v. Commonwealth, 190 Va. 435, 57 S. E. (2d) 109. A copy of that opinion is forwarded with this letter, and your attention is called to the terminal question and answer.

As indicated in your communication, the foregoing response obviates consideration of your second inquiry.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Witnesses—Justice of Peace not competent to testify on refusal to submit to test.

CRIMINAL PROCEDURE—Witnesses—Justice of Peace not competent to testify on trial of person refusing blood test.

December 12, 1962

HONORABLE GEORGE ABBITT, JR.
Commonwealth's Attorney for Appomattox County

This will reply to your letter of November 26, 1962, in which you inquire whether or not a justice of the peace, before whom a person arrested for operating a motor vehicle while under the influence of intoxicants is taken, would be a competent witness at the subsequent trial of such person for the above-mentioned offense or the offense of refusing to submit to a blood test in violation of § 18.1-55 of the Virginia Code.

Pertinent to the resolution of this question is § 19.1-268 of the Virginia Code which provides:

"No judge or justice of any court, or clerk of either, or justice of the peace, or other person having the power to issue warrants or try cases shall be competent to testify in any criminal or civil proceeding, except proceedings wherein the defendant is charged with perjury,
as to any matter which shall have come before him in the course of his official duties as such issuing or trying officer."

In light of the above-quoted language, I am of the opinion that a justice of the peace in the situation you describe would not be competent to testify at the trial of an accused for either of the offenses in question. However, I do not believe that the provisions of § 19.1-268 are incompatible with those of § 18.1-55(g) of the Virginia Code. Under the Virginia "implied consent" law, a person arrested for operating a motor vehicle while under the influence of intoxicants may (1) submit to a blood test or (2) refuse to submit to a blood test and declare his refusal in writing on a form in accordance with § 18.1-55(g) or (3) refuse to submit to a blood test and further refuse to execute the declaration of refusal form prescribed by § 18.1-55(g) of the Virginia Code. In the latter instance, § 18.1-55(h) directs that the committing justice shall certify the fact of the accused's refusal to execute the declaration of refusal form and the fact that the committing justice advised the accused of the consequences of his refusal to submit to a blood test, and shall forthwith issue a warrant charging the accused with a violation of § 18.1-55 of the Virginia Code.

MOTOR VEHICLES—Blood Analysis—Implied Consent—Written consent for blood test not necessary.

August 27, 1962

HONORABLE JOHN L. APOSTOLOU
Assistant Commonwealth's Attorney for the City of Roanoke

This will reply to your letter of recent date, in which you call my attention to § 18.1-55 of the Virginia Code, generally known as the Virginia "implied consent" law, and present the following situation and inquiries:

"The hospitals in the City have taken the position that prior to the withdrawing of a blood sample from any person charged with driving while under the influence of intoxicants, it is necessary for the accused to execute a form prepared by the hospital authorizing a member of their staff to withdraw the blood from his person.

"Our first inquiry is as follows: If a person charged with driving while under the influence of intoxicants consents to the taking of a sample of his blood but refuses to execute the form required by the hospital authorizing a member of its staff to withdraw a sample of blood from him, can the accused then be charged with unreasonably refusing to permit a sample of his blood to be taken in violation of Section 18.1-55 of the Code of Virginia as amended?

"The second inquiry is as follows: If an accused refuses to execute the aforementioned authorization required by the hospital and as a result the blood sample is not taken, does the Commonwealth lose its right to prosecute the accused under the charge of driving while under the influence of intoxicants?"

Initially, I might state that I concur in the view expressed in your communication that the statute under consideration does not require a person arrested for operating a motor vehicle while under the influence of intoxicants to indicate, in writing, his consent to the withdrawal of a sample of his blood for analysis to determine its alcoholic content. Oral consent expressed to the arresting officer and to the physician, nurse or laboratory technician withdrawing the blood sample is all that is required by law, and the execution of a written form authorizing withdrawal of a blood sample is not a specified re-
quirement of the Virginia "implied consent" law. I am, therefore, of the opinion
that your first inquiry must be answered in the negative, and that a person who
orally consents to the taking of a blood sample but refuses to execute a form of
the type in question may not be charged with "unreasonably refusing" to submit
to a blood test in violation of § 18.1-55 of the Virginia Code.

Pertinent with regard to your second question is § 18.1-55(f) of the Virginia
Code which, in part, provides that:

" . . . when the person arrested within two hours of the time of
his arrest requests or consents to the taking of a blood sample for
chemical analysis, if the result of such chemical analysis of the blood
sample taken is not received in evidence at the trial for any reason
whatever, including but not limited to the failure on the part of any
person, except the person arrested, to comply strictly with every pro-
vision of this section, then the rights of the person arrested shall be
deemed to have been prejudiced, and he shall be found not guilty
of any offense under § 18.1-54, or of any similar ordinance of any
county, city or town, and his license shall not be revoked under any
provision of this section."

In light of the above-quoted language and the position taken in response to
your intial inquiry, I am of the opinion that if the results of the analysis of the
blood sample of an accused are not received in evidence at his trial—after the
accused has orally consented to the withdrawal of a sample of his blood—
he must be found not guilty of the offense of operating a motor vehicle while
under the influence of intoxicants.

MOTOR VEHICLES—Blood Analysis—Offense for refusing test to be tried
separately from offense of drunk driving.

CRIMINAL PROCEDURE—Blood Analysis—Offense for refusing test to be
tried separately from offense of drunk driving.

HONORABLE WILLIAM H. HODGES
Member, House of Delegates

August 20, 1962

I am in receipt of your letter of August 10, 1962, in which you call my at-
tention to § 18.1-55 of the Virginia Code, generally known as the Virginia "im-
plied consent" law, and inquire whether or not it is permissible to try an individ-
ual for violation of this statute on the same day that such individual is tried for
operating a motor vehicle while under the influence of intoxicants.

So far as it is relevant to the instant question, § 18.1-55(h) of the Virginia
Code provides that when a person arrested for operating a motor vehicle under
the influence of intoxicants refuses to permit a sample of his blood to be taken
determine its alcoholic content, the committing justice before whom such
person is taken "shall forthwith issue a warrant charging the person refusing
to take the test to determine the alcoholic content of his blood, with violation
of this section, which warrant shall be executed as any other criminal war-
rant." Section 18.1-55(i) directs that such warrant shall be forwarded
by
the
committing justice to the court in which the offense of driving under the influence
will be tried, and § 18.1-55(j), in pertinent part, provides:

"When the court receives the certificate of refusal referred to in par-
agraph (i), together with the warrant charging the defendant with
violation of § 18.1-55, the court shall fix a date for the trial of said
warrant at such time as the court may designate, but subsequent to
the defendant's trial for driving under the influence of intoxicants. . . .” (Italics supplied).

It would appear that the above-quoted language is susceptible of at least two interpretations: (1) that the date for the trial of the warrant charging a violation of § 18.1-55 (refusal to submit to a blood test) must be subsequent to the date upon which the accused is tried for driving under the influence of intoxicants, or (2) that the trial of the warrant charging a violation of § 18.1-55 must be subsequent to the trial of the accused for driving under the influence of intoxicants. Since the statute declares that a date shall be fixed for the trial of the warrant charging a violation of § 18.1-55 “at such time as the court may designate,” I am constrained to believe that the court may designate the same date for the trial of both of the offenses in question, so long as the trial upon the warrant charging a violation of the Virginia “implied consent” law is subsequent to the accused’s trial for operating a motor vehicle while under the influence of intoxicants.

However, in light of the fact that more than one interpretation of the provision under consideration is possible, it would seem desirable to designate different dates for the trial of each offense and thus insure compliance with the statute. In any event, I concur in the view that it would not be permissible for a court to try “both offenses at the same time.”


HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will reply to your letter of August 13, 1962, in which you call my attention to Section 18.1-55 of the Virginia Code, generally known as the Virginia “implied consent” law, and request to be advised concerning the procedure which should be followed when the blood sample container which has been forwarded by an accused to the laboratory of his choice is returned to the clerk of the court in which the charge of operating a motor vehicle while under the influence of intoxicants will be heard.

Section 18.1-55(c) of the Virginia Code, in pertinent part, provides that:

". . . the certificate attached to the container forwarded by or on behalf of the accused shall be returned to the clerk of the court in which the matter will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner."

As you are aware, this office has previously ruled that the results of the analysis of the blood sample given to an accused and subsequently returned to the clerk of the court, as prescribed by the above-quoted statute, may be introduced in evidence on behalf of the Commonwealth. I am of the opinion that the clerk of the court in question may open the package which he receives and identify the blood sample container and the attached certificate. I am further of the opinion that the clerk should retain possession of these items until they are called for at the trial or until he is otherwise directed by the court, and that the Commonwealth’s Attorney may inspect such items in the clerk’s office prior to the date of trial.
MOTOR VEHICLES—Blood Analysis—When certificate admissible—Failure of accused to pay costs of analysis.

CRIMINAL PROCEDURE—Blood Analysis—Certificate of medical examiner admissible in evidence in drunk driving case over objection of accused.

August 8, 1962

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will reply to your letter of July 23, 1962, in which you pose certain questions relating to § 18.1-55 of the Code of Virginia (1950), as amended, generally known as the Virginia "implied consent" law.

Initially, you inquire whether or not the results of an analysis of the blood sample given to a person arrested for driving under the influence of intoxicants, and subsequently returned to the clerk of the court as prescribed in § 18.1-55(c), may be introduced on behalf of the Commonwealth in those instances in which the blood sample sent by the arresting officer to the Chief Medical Examiner cannot be analyzed because such sample did not contain a sufficient amount of blood for an analysis to be made.

I am of the opinion that the above-stated question should be answered in the affirmative. In this connection, § 18.1-55(c), in pertinent part, provides that:

"... the certificate attached to the container forwarded by or on behalf of the accused shall be returned to the clerk of the court in which the matter will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner." (Italics supplied).

Although the statute under consideration prescribes that the certificate of the Chief Medical Examiner may be returned either to the police officer making the arrest, the department from which it came, or the clerk of the court in which the matter will be heard, the certificate of the pathologist or laboratory supervisor indicating the results of the analysis of the blood sample given to the accused may not be forwarded to the accused, but may only be returned to the clerk of the court in which the matter will be heard. That portion of the statute italicized above declares that, when so returned, "such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner." If the accused refuses to pay the costs of having his blood sample analyzed by the laboratory of his choice, his inability to have the benefit of the results of such analysis will be occasioned by his own failure to comply with the requirements of the statute, and this default would not preclude prosecution of the offense of driving under the influence of intoxicants. See, § 18.1-55(f) of the Virginia Code. There is no responsibility upon officials of...
the Commonwealth to insure that the analysis of the sample forwarded by an accused to the laboratory of his choice is completed prior to the date of trial. However, if such analysis has not been completed because the accused has only recently been advised of the necessity of paying therefor, the trial court may grant a continuance to enable the accused to secure such an analysis.

MOTOR VEHICLES—Carriers of Property—Rates fixed by I.C.C.—Federal legislation to remove bulk items from minimum rate not discriminatory.

HONORABLE H. H. HARRIS
Commissioner, Virginia Department of Highways

August 14, 1962

This will acknowledge receipt of your letter of July 24, 1962, with reference to certain legislation now pending in the Congress of the United States, and your request that I advise you as to:

1. The legal effect of the proposed legislation in regard to highway construction, and
2. Whether or not this legislation favors one mode of transportation over another.

A review of Senate Bill 3243 and House Bill 11583 reveals that both bills deal with the exemption of certain carriers from minimum rate regulations in the transportation of bulk commodities, agricultural, and fishery products, and passengers, and that both bills are identical. Consequently, this reply will consider both bills together.

Under existing legislation, transportation in bulk of commodities used in highway construction is generally subject to minimum rate regulation by the Interstate Commerce Commission. Rates on purchases by the State are exempt from the minimum rate regulation of the Interstate Commerce Commission by Section 22 of Title 49, United States Code, and by § 56-107 of the Virginia Code, and may be negotiated directly between the State and the carrier. This exemption does not extend to purchases by contractors, sub-contractors, materialmen, or other persons engaged in highway construction, but is limited to purchases by the State. If, however, the negotiated rates were sufficiently cheaper than the minimum rates on such commodities, the State could take advantage of this situation by purchasing the bulk commodities necessary for State use in the name of the State for the contractors, etc., mentioned above.

The effect of the proposed legislation would be to enable contractors engaged in highway construction, as well as any other person, to negotiate directly with the carriers with respect to rates on such commodities, to the extent that the State may now make such negotiations.

With regard to the question of favoring one mode of transportation over another, the legislation as proposed would remove the authority of the Interstate Commerce Commission to regulate minimum rates on transportation of bulk commodities, and other items listed above, by any mode of transportation. The legislation, therefore, from a legal standpoint, does not favor one mode of transportation over another. Obviously, there are great differences in the economic status of the various modes of transportation, or in the individual carriers. The passage of this legislation might have broad economic repercussions, but I do not consider this a legal problem, but a question of business judgment and, therefore, no opinion is expressed in regard to this matter.

I might mention that I have been advised that it is the feeling of the Virginia State Ports Authority that the passage of this legislation would be very detrimental to our Virginia ports because certain preferential tariffs now existing would be eliminated.
HONORABLE EDWARD E. WILLEY
Virginia State Senator

This is in reply to your letter of February 26, 1963, which reads, in part, as follows:

"Many of our motor vehicle statutes provide minimum and maximum penalties as to fine and confinements, and it has occurred to me in the light of certain recent events that perhaps remedial legislation may be in order if it is determined that these statutes cannot be fully utilized with particular reference to the chronic or "repeater" violator of our motor vehicle laws.

"The point that gives me great concern is the proper use which can be made of the penalty provisions of these various statutes in relation to the prior driving record of an individual as expressed in terms of accidents and convictions. To be specific, I would like to know if, at the time the defendant is before the court on a charge arising out of a single violation of the statutes relating to the operation of motor vehicles, and said defendant is found guilty of such charge, can the court consider or review the previous driving record of such defendant in determining the extent of the penalty to be imposed upon such defendant by the court as a result of the finding of guilty as set forth above? If your answer should be in the affirmative, can the judge review the defendant's prior record of convictions without regard as to any lapse of time?"

To consider your inquiry properly, I think it advisable to point out that most of the statutes regulating the operation of motor vehicles prescribe a minimum and maximum penalty for a single violation. In addition thereto, many of the statutes prescribe a greater penalty for subsequent offenses and the minimum and maximum penalties increase with successive convictions. Other statutes, such as § 46.1-421 of the Code, impose a separate penalty in the nature of revocation of an operator's license, which revocation is automatically imposed by the Commissioner of the Division of Motor Vehicles upon receipt of the record of convictions for specific offenses.

You did not inquire as to the consideration which may be given a record of prior convictions in a case in which the accused is charged with a second or subsequent offense under a statute which imposes a greater penalty for repeated violations. In such case, the record of prior convictions for similar offenses is relevant and may be introduced for the purpose of determining the extent of punishment. In this regard, I point out that it is necessary to allege the prior convictions, as well as prove them. See, Commonwealth v. Ellett, 174 Va. 403; Kincaid v. Commonwealth, 200 Va. 341.

Your specific inquiry is whether the record of prior convictions may be considered by the court in a prosecution for a single violation of the statutes relating to the operation of motor vehicles.

By virtue of well-established principles, the general rule on admissibility of evidence in criminal prosecutions would preclude introduction of evidence of prior convictions unless one of the exceptions to that general rule is applicable. Generally speaking, in a prosecution for a specific traffic violation there would be no exception to the general rule, for the prejudicial effect upon the court or jury tends to outweigh the evidentiary value of such evidence.

I am, therefore, of the opinion that under existing law the court may not consider the record of prior convictions of the accused for the purpose of fixing the penalty for a single violation for which the accused is charged.
If, on the other hand, the accused be charged with a second or subsequent offense under a statute imposing a more severe penalty for "repeaters," or under a statute, such as § 46.1-423.1 of the Code, in which a separate and distinct penalty is imposed for chronic offenders. I am of the opinion that it is not only proper, but necessary, to introduce the record of prior convictions for similar offenses.

In reply to your second inquiry as to the time period for referring to the record, I am of the opinion that this would depend upon the statute under which the accused is being prosecuted. For example, it would be improper to consider the record of offenses occurring over a ten-year period if the statute provides an increased penalty for subsequent convictions within a five-year period.

MOTOR VEHICLES—Fuel Carrier—When lettering required on vehicle.

HONORABLE WILLIAM R. BLANDFORD
Commonwealth's Attorney for Powhatan County

June 26, 1963

This is in reply to your letter of June 19, 1963, which quotes, in part, as follows:

"'A' transports motor fuel from Richmond to Appomattox by his own tractor-trailer tank operated by his employee. The tank does not have lettered or stencilled on same the words 'gasoline' or 'flammable' nor is the capacity lettered on same as required by Section 46.1-145 of the Code.

"Does this section of the Code apply to said private vehicle?"

In order to determine whether or not the requirements of Section 46.1-145 are applicable to a vehicle transporting motor fuel, the situation must be considered in reference to Section 46.1-140, which is the basis for the application of all the other sections contained in Article 8, Chapter 3, Title 46.1, Code of Virginia (1950), as amended, and is as follows:

"In addition to any other requirement imposed by law every person transporting motor fuel as a contract or common carrier, shall before entering upon the highways or waterways of this State, register his conveyance with the Division upon forms to be provided by the Commissioner."

Under this statute every person transporting motor fuel as a contract or common carrier is required to register his conveyance with the Division before entering the highways (or waterways) of this State. This is in addition to the registration required by other statutes. The law does not require additional registration, however, if the person transporting the motor fuel is not doing so either as a contract carrier or as a common carrier.

Section 46.1-145, Code of Virginia (1950), as amended, is as follows:

"All such conveyances shall have lettered or stenciled on both sides of the conveyance the name and address of the owner in letters not less than three inches high. On the tank shall be lettered or stenciled on both sides and the rear thereof the words, 'Gasoline' or 'flammable' and capacity in gallons, in letters not less than four inches high."

The language "all such conveyances" used in this section refers to those conveyances required to be registered under Section 46.1-140, previously quoted
herein. In my opinion, the requirements of Section 46.1-145 do not apply to a private vehicle which is used only to transport the owners motor fuel and is not required to be registered under Section 46.1-140. Assuming for the purposes of this letter that you refer to such private vehicle, I shall answer your question in the negative.

MOTOR VEHICLES—Licenses—For Hire—Not required for vehicles owned by producer of asphalt delivering his own property from his regular place of business.

MOTOR VEHICLES—Licenses—Trucks transporting asphalt—When "for hire" license not required—§§ 46.1-1 (35) and 56-275.1.

HONORABLE JOHN ALDERMAN
Commonwealth's Attorney for Carroll County

June 28, 1963

This is in reply to your letter of June 21, 1963 in which you request my opinion as to whether or not the operation described in the following quoted paragraph comes under the definition of "operation or use for rent or for hire" found in Section 46.1-1 (35):

"A partnership is engaged in the business of selling asphalt and rock to highway contractors. The partnership has its own quarry and there crushes its own rock and makes the asphalt. The partnership, employing drivers other than the partners, hauls the material so produced in its own vehicles upon the public highways to the various construction sites. The partnership is paid by the highway contractors in a flat sum for the materials so delivered."

Section 46.1-1 (35), Code of Virginia (1950), as amended, is as follows:

"The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a 'truck lessor' as defined herein."

The language of this subsection is very inclusive. In the absence of any additional clarification by the legislature, it would seem to encompass any transporting operation upon the highways for which any compensation is accepted or received by the owner of the vehicle, directly or indirectly. Referring to related statutes, however, Section 56-275.1, Code of Virginia (1950), as amended, reads in part, as follows:

"The presence on a motor vehicle, trailer or semitrailer of property as to which the owner or operator of such motor vehicle, trailer or semitrailer is unable to show evidence of ownership or of having produced the same, or that he has sold the same in the regular course of his usual business, shall be prima facie evidence that he is transporting such property for compensation.

* * * * *

"Any person who purchases articles, merchandise, commodities or things at one point or points and transports them in a motor vehicle,
trailer or semitrailer to another point or points for sale at the latter point or points, in the sale price of which is reflected a charge for the transportation of such articles, merchandise, commodities or things, or who permits any such vehicle to be so used by another, shall be deemed to be operating such vehicles for compensation; provided, that this provision shall not apply to merchants maintaining a bona fide and regular place of business and transporting to and delivering from such place of business by motor vehicle, trailer or semitrailer articles, merchandise, commodities and things sold by them, * * *" (Emphasis supplied).

In consideration of the provisions, contained in the emphasized portion of the statute, making an exception for merchants maintaining a bona fide and regular place of business and transporting commodities and things sold by them, this office has previously held that a person engaged in the business of producing a product and delivering it upon his own vehicle operates as a private carrier. See, Report of the Attorney General, (1961-1962), pp. 164-165. In harmony with this position, the inference to be drawn from the first paragraph of this section, quoted above, which makes the inability to show evidence of ownership or production of the product transported prima facie evidence of transporting property for compensation, is that where evidence of such ownership or production is shown the product is not presumed to be transported for compensation.

In the instant case, the partnership is in the business of producing the products from its own quarry. It maintains a bona fide and regular place of business from which it delivers its own products upon its own vehicles. It is, therefore, my opinion that the operation which you describe is that of private carrier, rather than one which requires that the partnership vehicles be licensed as "for rent or for hire."

MOTOR VEHICLES--Licenses--Public use tag—When permissible.

February 19, 1963

HONORABLE JAMES B. RICHARDSON
Treasurer for the Town of Marion

This is in reply to your letter of February 13, 1963, in which you ask my opinion regarding the use of license tags issued by the State without cost to a town for public use, and pose three questions which I shall quote and answer individually, as follows:

"1. Is it permissible for an individual employee regardless of status to use any vehicle for personal matters carrying a public use tag?"

No. It is not permissible for any employee to use any vehicle so licensed for personal matters. Section 46.1-49, Code of Virginia (1950), as amended, which authorizes the issuance of such tags, states, in part, as follows:

"Motor vehicles, trailers and semitrailers owned by the State and counties, cities and towns thereof and used purely for State, county and municipal purposes shall be required to be registered and no fee shall be collected for such license plates and registration, * * *"

The qualifying language "used purely for State, county and municipal purposes" is clear and unambiguous and leaves no room for doubt as to the proper use of such vehicles.

"2. Must a vehicle carrying a public use tag be housed at a designated
place at the end of its tour of work during any day, or is it permissible for the operator to commute to his or her home each night, leaving the car parked there? (Town vehicles only)"

There is no State law requiring that a town vehicle so licensed be housed at a designated place or in any specific manner. This should be controlled by the town concerned, but in such manner as to comply with the law, previously cited, by limiting the use of the vehicle to town purposes, to the exclusion of use by any person for any personal matters.

"3. License tags issued by The Division of Motor Vehicles ‘FREE’ such as some police vehicles to hide their identity, do these come under the same restrictions as applies to PUBLIC USE license?"

Such police vehicles are subject to the same restrictions regarding use for purely municipal purposes as are applicable to any other vehicle owned by the town and registered under Section 46.1-49. This section, however, requires that the words "Public Use" be stamped or printed on all such plates except those issued to be used on cars devoted solely to police work. A municipality must certify to the Commissioner of Motor Vehicles the cars to be used solely in police work, in order to obtain unmarked tags for these vehicles.

MOTOR VEHICLES—Licenses—Revocation—Localities not authorized to impose penalty for operation without license.

ORDINANCES—Motor Vehicles—Cities not authorized to impose penalty for operating motor vehicle after license revocation.

Honorable Vernon D. Hitchings, Jr.
Judge, Municipal Court, Part II, City of Norfolk

February 21, 1963

This is in reply to your letter of February 6, 1963, in which you ask my advice regarding the question of authority for the City of Norfolk to charge a motorist under an existing parallel city ordinance, rather than under the State statute, making the operation of a motor vehicle during a period of license revocation a crime, and the proper disposition of the fine or forfeiture in case of such conviction.

The Operators' and Chauffeurs' License Act, embodied in Chapter 5, Title 46.1, Code of Virginia (1950), as amended, leaves no room for doubt that the authority for issuing an operator's or chauffeur's license rests solely in the State. Section 46.1-353 thereunder expressly prohibits counties, cities and towns of this State "from requiring any other operator's license or local permit to drive" except in regard to "regulations for the licensing of drivers of taxicabs and other similar for hire passenger vehicles."

Since the governing bodies of the political subdivisions of the State have no authority with respect to the issuance of an operator's license or revocation of any such license, they may not enforce ordinances imposing penalties with respect thereto in the absence of express legislative authority.

The penalty for driving a motor vehicle while an operator's license has been suspended or revoked is set forth in § 46.1-350 of the Code. There is no statute relating to this subject comparable to § 15-553 of the Code which delegates to local governing bodies the power to parallel the statute involving penalties for drunk driving.

In our opinion, the provisions of § 46.1-180 do not authorize localities to enforce ordinances of the nature under discussion here. We do not find any
language in the Charter provision cited by you that grants such power to the council of the City of Norfolk.

This question has been the subject of two opinions published in the Report of the Attorney General (1960-1961). These opinions, one of which you referred to, are found on p. 220.

I am enclosing a copy of an opinion relating to this question which was issued by Attorney General Staples on May 19, 1943, and which is published in Report of the Attorney General (1942-1943), p. 34.

In light of these opinions and the fact that no substantial amendments to the applicable statutes have been made since these opinions were rendered, we feel that our conclusions under the well-settled principles of statutory construction are in accord with the intent of the laws pertaining to this question. It is the prerogative of the General Assembly to grant express powers of the nature involved if it deems such action to be advisable.

MOTOR VEHICLES—Licenses—Revocation—When license suspended under § 46.1-442 to be reissued.

September 24, 1962

HONORABLE PETER M. AXSON, JR.
Commonwealth’s Attorney for Norfolk County

This is in reply to your letter of September 18, 1962, in which you ask my opinion with respect to the situation and question which you present in the following passage:

"An order of suspension was issued against a resident of Virginia in January, 1957, because of the judgment obtained against the defendant in 1956 which judgment, although discharged in bankruptcy, has not been satisfied. The order of suspension was in accordance with the provisions of Section 46-428 of the 1950 Code of Virginia, which section is now 46.1-439. My question is this: Can the person whose operator’s license, registration certificate, etc., were revoked by an order of suspension as above described for the reasons hereinbefore set forth, apply to the Division of Motor Vehicles and have reissued the operator’s license and registration card under the provisions of 46.1-439 in view of the fact that five years have elapsed since the order of suspension aforesaid."

When the motor vehicle laws of Virginia were recodified by Chapter 541 of the Acts of Assembly, approved March 29, 1958, former Section 46-428, under which you state the order of suspension was issued, became Section 46.1-442. The only amendment to this section was the change in the period allowed to satisfy the judgment, from fifteen to thirty days, which has no bearing on the point under consideration. Section 46.1-459, Code of Virginia (1950), as amended, contains the following:

"(b) The suspension required by the provisions of § 46.1-442 shall continue except as otherwise provided by §§ 46.1-446 and 46.1-448 until the person satisfies the judgment or judgments as prescribed in § 46.1-444 and gives proof of his financial responsibility in the future." (Emphasis supplied).

None of the exceptions noted apply to this case, but it will be seen that the suspension shall continue until the person satisfies the judgment and thereafter gives proof of financial responsibility. These requirements were likewise contained
in former §§ 46-446 and 46-447 which were in effect prior to the 1958 recodification mentioned, supra.

In regard to the time such suspension shall remain in effect, I quote, in part, Section 46.1-439, Code of Virginia (1950), as amended:

"Every suspension or revocation shall remain in effect and the Commissioner shall not issue to such person any new or renewal license or register in his name any motor vehicle, until permitted under the provisions of this chapter, except that when five years shall have elapsed from the date of the termination of the revocation provided by § 46.1-417 or § 46.1-421, or in the case of a suspension pursuant to the provisions of § 46.1-442, when five years have elapsed from the date of satisfaction of the judgment or judgments, such person may be relieved of giving proof of his financial responsibility in the future, provided such person is not required to furnish or maintain proof of financial responsibility under any other provision of this chapter." (Emphasis supplied).

The words "until permitted under the provisions of this chapter" are significant, as they apply to § 46.1-439 which requires that a person who has had his licenses and registration suspended under § 46.1-422 (former 46-428) shall satisfy the judgment upon which the suspension was based before such suspension may be terminated. In addition, he must furnish proof of financial responsibility until five years have elapsed from the date of satisfaction of the judgment in order to qualify for licenses and registration during such five-year period. Furthermore, § 46.1-394 provides that a discharge in bankruptcy shall not relieve the judgment debtor.

It is clear that the satisfaction of the judgment and the date it is satisfied, rather than the date of the order of suspension, are the determinative factors upon which termination of the suspension and relief from filing proof of financial responsibility may be based. Accordingly, I must answer your question in the negative.

MOTOR VEHICLES—Licenses—Truck registered and licensed under § 46.1-154 for highway use—Subject to violation of § 46.1-159 while used upon highways for agricultural purposes.

MOTOR VEHICLES—Registration and Licensing—No exemption under § 46.1-45 for truck registered and licensed for non-agricultural purposes.

HONORABLE J. TAYLOR WILLIAMS
Judge, Cumberland County Court

September 14, 1962

This is in reply to your letter of September 6, 1962, which reads as follows:

"I will greatly appreciate your opinion as to whether the following facts would constitute a violation of Code Section 46.1-159:

"A farmer who owns a truck used primarily but not exclusively for agricultural purposes registers it and licenses it for occasional use beyond the ten-mile limit and non-agricultural uses on the public highways. The truck, while being used exclusively for agricultural purposes (hauling hay from one of the owner's farms to another within ten miles) is weighed and found to be loaded over the licensed weight, but not over the axle-weight limitation of Section 46.1-339.

"If your opinion in the above is in the affirmative, would there have been a violation of Section 46.1-159 if the farmer had removed the license plates while using the truck for hauling the hay and other
exclusively agricultural purposes coming within the provisions of Section 46.1-45?"

Section 46.1-45, Code of Virginia (1950), as amended, contains the following provisions which are pertinent to the situation in question:

“(a) No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, * * * for any motor vehicle, trailer or semitrailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs.” (Emphasis supplied).

It is well settled that exemptions from the provisions of the tax laws of this State are strictly construed against the taxpayer. In order to qualify for exemption from registration and licensing, all requirements of the exemption statute must be fully met. One requirement in the quoted section is that the motor vehicle must be one which is used exclusively for agricultural or horticultural purposes. The statute further requires that the motor vehicle, in order to be exempt from registration and licensing, be one which is not operated over any public highway of this State for any other purpose other than those stated therein. You state that the truck is used primarily but not exclusively for agricultural purposes and is, on occasion, operated over the highways for other purposes than those stated in § 46.1-45. For these reasons, the truck does not fall within the exemption provisions of § 46.1-45 and its use for such "other purposes" requires that it be registered and licensed under § 46.1-154. Section 46.1-159 declares the operation of any motor vehicle "for which the fee for registration and license plates is prescribed by § 46.1-154 on any highway of this State," to be unlawful under the following circumstances: "If, at the time of any such operation, the gross weight of the vehicle or of the combination of vehicles of which it is a part, is in excess of the gross weight on the basis of which it is registered and licensed." It is, therefore, my opinion that the operation described in your letter constitutes a violation of Section 46.1-159.

With regard to the question posed in the final paragraph of your letter, it is my interpretation of the registration and licensing laws that a person may not bring his motor vehicle within the exemption provisions of § 46.1-45 merely by a temporary removal of the license plates. Since the truck was required to be registered, it would have constituted a violation of law under § 46.1-64 to operate it upon the highway without the license plates assigned thereto by the Division of Motor Vehicles, regardless of whether or not it was operated for agricultural purposes. Likewise, since it was required to be registered and display license plates under § 46.1-154, there would have been a violation of Section 46.1-159 if the farmer had removed the license plates under the stated circumstances.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Licenses—When service personnel subject to county license tax—When exempt under Soldiers' and Sailors' Civil Relief Act.

MOTOR VEHICLES—Local License—When counties authorized to tax service personnel.

HONORABLE BAXLEY T. TANKARD
Commonwealth's Attorney for Northampton County

November 9, 1962

This is in reply to your letter of November 2, 1962, which reads as follows:

"It will be appreciated if you can give me your opinion concerning the enforcement of the Northampton County Ordinance providing for County motor vehicle tags as same might pertain to servicemen living on a Government reservation within Northampton County.

"I have reviewed the case of Whiting v. City of Portsmouth, 202 Va. 609, in which it appears that a serviceman living in the City of Portsmouth was required to buy a City motor vehicle license. However, in the second paragraph beginning on Page 610, I find that the opinion takes note of the fact that the defendant in such case lived 'in the City of Portsmouth (not on a Government reservation).’ In your opinion what would have been the results of such case if the defendant had lived on a Government reservation? I believe the facts of that case would be substantially similar to the facts I refer to in Northampton County except that the servicemen live on the Cape Charles Air Force Base which is a Government reservation in this County."

In the case to which you allude, the serviceman qualified as a resident of Virginia by registering his motor vehicle in Virginia, listing a Portsmouth address in the application for registration. This requirement is found in § 46.1-1 (16) (C), Code of Virginia (1950), as amended, which is as follows:

"A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle listing an address within this State in the application for registration, shall be deemed a resident for the purpose of this title."

The serviceman claimed exemption from the city license tax on his automobile under the Soldiers' and Sailors' Civil Relief Act, 50 App., U.S.C.A., § 574. This Act declares that, for the purposes of taxation, a person neither loses nor gains a residence or domicile solely by reason of his absence from or presence in a state in compliance with military or naval orders. The court held that, under the provision of Paragraph 2 of that Act, the serviceman was not exempt from the payment of the license tax assessed by the City of Portsmouth, since he had not paid such license tax in the State of claimed residency, or elsewhere than in Virginia. As you state you believe the facts pertaining to the Northampton servicemen to be substantially similar to the Portsmouth case, with the one exception that they live on the Cape Charles Air Force Base, a Government reservation, it will be assumed that they have obtained Virginia registration and license plates for their motor vehicles giving that address, and that they have not paid such a license tax in any other state or elsewhere than in Virginia. These were the essential facts in the Portsmouth case.
In my judgment, the Cape Charles Air Force Base in Northampton County comes within the purview of § 46.1-1 (16) (C), quoted supra, as an "address within this State." It is my opinion, therefore, that under such circumstances, the servicemen would be deemed residents for the purposes of Title 46.1 and their motor vehicles would be taxable under § 46.1-65, Code of Virginia (1950), as amended, which authorizes the counties, cities and towns to impose the local license tax on motor vehicles. In any instance in which a nonresident serviceman's motor vehicle is properly licensed by the domiciliary state, however, the County of Northampton is without authority to impose the tax.

MOTOR VEHICLES—Local License—Automobile dealers.

May 24, 1963

HONORABLE M. WATKINS BOOTH
Commonwealth's Attorney of Dinwiddie County

This is in reply to your letter of May 16, 1963, from which I quote, as follows:

"The Board of Supervisors have requested me to get an opinion from you involving County Auto Tags. There seems to be some question whether an automobile dealer has to obtain a County License Tag. I have been informed that your office ruled sometime ago that a dealer did not have to purchase County License Tags, however, I have no official ruling from your office with reference to that. It appears to me that the owners of the dealership could operate his personal car which is titled in the name of the dealership without obtaining a County tag if your previous ruling to this is still in effect."

Section 46.1-66, Code of Virginia (1950), as amended, reads, in part, as follows:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

* * * * * *

"(5) The motor vehicle, trailer or semitrailer is kept by a dealer or manufacturer for sale or for sales demonstration;"

Under the language quoted, a county is prohibited from imposing a license tax on motor vehicles kept by a dealer for sale or for sales demonstration. Under a prior statute, (Section 46-64), which excepted from local license tax vehicles "used by a dealer or manufacturer for sales purposes," this office expressed the opinion that a county was prohibited from imposing a tax on motor vehicles owned by a dealer and held for sales purposes. See, Report of the Attorney General (1955-1956), p. 130.

The statute, in my opinion, does not extend to any motor vehicle owned by a dealer but not kept by such dealer for these purposes, regardless of how it may be titled. The prohibition against imposition of the tax by a county applies only to vehicles kept for sale or for sales demonstration. Under § 46.1-115, Code of Virginia (1950), as amended, dealer's license plates may be used on any such vehicle owned by, or assigned to a dealer when operated upon the highways of this State by such dealer or his authorized representative for demonstration or sale.
MOTOR VEHICLES—Local License—Locality may not require evidence of payment of all personal property tax.

June 27, 1963

HONORABLE HALE COLLINS
Member, Virginia State Senate

This will acknowledge receipt of your letter of June 26, 1963, enclosing an ordinance adopted by the City of Covington. This ordinance reads as follows:

"BE IT ORDAINED that no motor vehicle, motorcycle, trailer, or semi-trailer shall be locally licensed by the City of Covington, Virginia, unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, motorcycle, trailer or semi-trailer to be licensed have been paid, which have been properly assessed or are assessable against the applicant by the City of Covington, Virginia."

An ordinance of this nature may be adopted by a city under § 46.1-65(c) of the Code. This section reads as follows:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town."

This section of the Code, of course, would not permit a locality to require a person making application for a license under § 46.1-65 to produce evidence of payment of personal property taxes on any other property owned by him. In other words, the evidence of payment of taxes may relate only to the motor vehicle sought to be licensed.

MOTOR VEHICLES—Local License—Not applicable within Federal reservations.

January 7, 1963

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney of King George County

This is in reply to your letters of December 14, 1962 and January 2, 1963, in which you ask my opinion and advice as to whether military and civilian residents of Dahlgren Naval Proving Grounds, a government reservation upon which complete jurisdiction has been ceded to the United States, are subject to the King George County automobile license ordinance which is applicable to residents of the county.

Several former rulings of this office, including the one contained in the letter of April 10, 1956, to which you refer, have held that the people who reside on
the Dahlgren Naval Proving Grounds were not residents of King George County and the county was without authority to require such persons to purchase county license tags for their automobiles. See, Report of the Attorney General (1955-1956), pp. 129, 132 and 136. These rulings were based upon the fact that exclusive jurisdiction over the land was ceded to the United States under Chapter 382 of the Acts of Assembly of 1918. It has been held that this State has no jurisdiction over such ceded lands, and they are no longer a part of the State of Virginia. (Foley v. Shriver, 81 Va. 568 and Bank of Phoebus v. Byrum, 110 Va. 708.) Under this holding any such address would not be an address within this State. It is, therefore, my opinion that the military and civilian residents of Dahlgren Naval Proving Grounds are not, by virtue of such residency, subject to the King George County automobile license tax. This is true, even though some or all of these persons may elect to register their automobiles and purchase license tags in Virginia.

MOTOR VEHICLES—Local License—When applicable within Federal reservations.

HONORABLE BAXLEY T. TANKARD
Commonwealth's Attorney for Northampton County

January 10, 1963

This is in reference to your letter of November 2, 1962, which reads as follows:

"It will be appreciated if you can give me your opinion concerning the enforcement of the Northampton County Ordinance providing for County motor vehicle tags as same might pertain to servicemen living on a Government reservation within Northampton County.

"I have reviewed the case of Whiting v. City of Portsmouth, 202 Va. 609, in which it appears that a serviceman living in the City of Portsmouth was required to buy a City motor vehicle license. However, in the second paragraph beginning on Page 610, I find that the opinion takes note of the fact that the defendant in such case lived 'in the City of Portsmouth (not on a Government reservation).' In your opinion what would have been the results of such case if the defendant had lived on a Government reservation? I believe the facts of that case would be substantially similar to the facts I refer to in Northampton County except that the servicemen live on the Cape Charles Air Force Base which is a Government reservation in this County."

In the case to which you allude, the serviceman qualified as a resident, for the purposes of Title 46.1 of the Code of Virginia, by registering his motor vehicle in Virginia, listing a Portsmouth address in the application for registration. This requirement is found in Section 46.1-1(16)(c), Code of Virginia (1950), as amended, which, states in part, as follows:

"A person ** who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title."

The question of whether or not a government reservation would be "an address within this State" within the purview of the quoted section is, in my interpretation, dependent upon whether this State holds jurisdiction over such land for the purposes of taxation or has ceded exclusive jurisdiction to the United States. See, Waltrip v. Commonwealth, 189 Va. 365. Chapter 382, Acts of Assembly of 1936, provided for the reservation to the Commonwealth of Virginia of certain
jurisdiction over lands thereafter ceded to the United States for any military or naval purpose. This retention of jurisdiction by the State is expressed, in part, in the following passage now found in §§ 7-18, 7-19, and 7-21, Code of Virginia (1950), as amended:

"For all purposes of taxation and of the jurisdiction of the courts of Virginia over persons, transactions, matters and property on such lands, the lands shall be deemed to be a part of the county or city in which they are situated."

It seems clear that, for all tax purposes, lands ceded to and held by the United States under provisions for retention by this State of such jurisdiction remain a part of the State and of the county or city in which they are situated. Chapter 422, Acts of Assembly of 1940, however, now embodied in § 7-24, Code of Virginia (1950), as amended, provides that additional jurisdiction may be ceded to the United States over any lands acquired or proposed to be acquired in Virginia, provided the right to serve civil and criminal process is reserved in the Commonwealth. Where exclusive jurisdiction has been ceded to the United States pursuant to this Act, the situation would be similar to that existing where exclusive jurisdiction was ceded to the United States prior to passage of the aforesaid Act of 1936. It has been held by our Supreme Court for many years that such lands, over which exclusive jurisdiction has been ceded to the United States, are no longer a part of this State, and it follows that a location thereon would not be an address within this State for the purposes here considered. See, Hercules Powder Co. v. Ruben, 188 Va. 694.

From information received, it appears that the Cape Charles Air Force Base is located upon lands acquired for use in connection with the Harbor Defenses of Chesapeake Bay at Fort John Custis, over which exclusive jurisdiction has been ceded to the United States, pursuant to Chapter 422, Acts of Assembly of 1940, by deed executed May 4, 1943, and recorded in Deed Book No. 104, p. 236, in the office of the Clerk of Northampton County. On the basis of this information, which was not previously before me, it is my opinion that the Northampton County ordinance providing for county motor vehicle license tags could not be enforced against servicemen residing on the Cape Charles Air Force Base, and my letter of November 9, 1962, is hereby modified accordingly.

MOTOR VEHICLES—Local License—When required of military personnel.

December 17, 1962

Honorable Otis B. Crowder
Treasurer for Mecklenburg County

This is in reply to your letter of December 12, 1962, in which you ask my opinion as to whether or not the "Soldiers' and Sailors' Act" exempts a person in military service from the requirement of obtaining a county automobile license tag in the county in which he is temporarily located.

It is my understanding that you have reference to nonresident persons residing in the county solely by virtue of their military service. The Soldiers' and Sailors' Civil Relief Act, 50 App. U.S.C.A. § 574, declares, in effect, that, for the purposes of taxation, a person neither loses nor gains a residence or domicile solely by reason of his absence from or presence in a State in compliance with military or naval orders. The Civil Relief Act was not intended as a means by which the person in service would escape altogether the payment of taxes. Its purpose is to prevent the injustice of multiple taxation of military personnel. In regard to certain taxes on motor vehicles, it contains the following language:
"The term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee or excise required by the State Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

The question which you pose does not permit an unqualified answer, since it is dependent upon whether or not the service person has paid the license tax required by his State of claimed residency or domicile. This interpretation of the aforesaid Civil Relief Act was expressed by the Supreme Court in the case of Whiting v. City of Portsmouth, 202 Va. 609, and is consistent with the view heretofore taken by this office and that enunciated by the federal courts. In consideration of the foregoing, it is my opinion that the nonresident person in military service who has paid the required current year license fee for his vehicle in his State of claimed residency is exempt from the payment of county license tax in the county in which he is residing in compliance with military or naval orders. If, however, he has not paid the license tax required by his State of claimed residency, or elsewhere than in Virginia, then he is not exempt from the payment of a county license fee imposed by the county in which he is residing.

MOTOR VEHICLES—Operator's License—Failure of person under 18 to have license revalidated—Effect after reaching 18 years of age.

JUVENILES—Motor Vehicle Operator's License—Failure to revalidate while under the age of 18.

October 16, 1962

HONORABLE JOHN PAUL CAUSEY
Commonwealth's Attorney of King William County

This is in reply to your letter of October 11, 1962, wherein you describe a situation in which a person has failed to have his operator's license revalidated while under the age of eighteen years, and pose the following question:

"Does his failure to have had the license revalidated while still under the age of 18 prohibit him from driving under the license issued to him after he has attained 18 years of age?"

Section 46.1-357, Code of Virginia (1950), as amended, contains, in part, the following:

"* * * * * (1) An operator's license may be issued to a minor over the age of fifteen years and under the age of eighteen years upon proper application therefor and upon satisfactory evidence that the minor is mentally, physically and otherwise qualified to drive a motor vehicle with safety. * * * * * (2) Each operator's license issued pursuant to the provisions of paragraph (1) hereof shall contain thereon a suitable legend that such license must be revalidated by the Division of Motor Vehicles within twelve months from the date of original issuance and each succeeding twelve-month period thereafter until the holder thereof attains the age of eighteen years, unless such license is sooner revoked, suspended or cancelled in accordance with other provisions of law. The absence of such evidence of revalidation appearing on such license shall be con-
sidered sufficient to prohibit and make unlawful the operation of any motor vehicle in this State by the licensee if such operation occurs after twelve months from the date of issue or last revalidation stamp appearing on such license. * * *

Any license issued under the provisions of the quoted statute "must be revalidated by the Division of Motor Vehicles within twelve months from the date of original issuance and each succeeding twelve-month period thereafter until the holder thereof attains the age of eighteen years." The failure of such licensee to secure timely revalidation is sufficient to prohibit the operation of any motor vehicle in this State and render any such operation unlawful. The license, in the absence of such required revalidation, would automatically become invalid and the licensee would be subject to the penalties provided for violation of Chapter 5, Title 46.1, if during such interim, he operated any motor vehicle in this State. The statute does not state that it shall be unlawful not to have the license revalidated. The statute does state that the absence of evidence of revalidation appearing on such license shall make it unlawful for such licensee to operate any motor vehicle in this State.

The requirement as to revalidation terminates when the operator attains the age of eighteen years. It is my opinion, therefore, that the licensee's failure to have his license revalidated while under the age of eighteen years does not prohibit him from driving under the license issued to him after he has attained the age of eighteen years.

MOTOR VEHICLES—Operator’s License—Falsifying application—§46.1-357 construed.

October 5, 1962

MR. CORY E. HARTBARGER
Probation Officer, Juvenile and Domestic Relations Court
Staunton, Virginia

This is in reply to your letter of September 25, 1962, in which you ask if a minor should be disqualified from obtaining a temporary driver's permit or held accountable for falsifying an application, for answering "no" to question 5 of the application inquiring whether or not the applicant has been convicted of any offense involving the operation of a motor vehicle.

Section 46.1-357, Code of Virginia (1950), as amended, as you have noted, provides that: "The minor shall be required to state in his application whether or not he has been convicted of an offense triable by, or tried in, a juvenile and domestic relations court." The succeeding sentence of the same statute reads as follows: "If it appears that such minor has been adjudged not innocent of the offense alleged the Division shall not issue a license without the written approval of the judge of the juvenile and domestic relations court making an adjudication as to such minor or the like approval of a similar court of the county or city in which the parent, guardian, spouse or employer respectively of the child resides."

It appears that the word "conviction" as used in the statute was intended to include "adjudged not innocent" since the last quoted sentence uses the latter term. It is clear that the law requires an adjudication of not innocent to be related to the Division, for otherwise the mandate of the statute could not be followed. It should also be remembered that findings of "not innocent," as well as convictions, require the revocation of the operator's license under the "Motor Vehicle Safety Responsibility Act." However, since in another question relative to such application the Division requires the minor under the age of eighteen years of age to state whether or not he has been declared "not innocent" of
any offense in a juvenile and domestic relations court, such answer would necessarily cover question 5 of the application which relates only to offenses involving the operation of motor vehicles.

In consideration of the clause in Section 16.1-179, Code of Virginia (1950), as amended, providing that no adjudication upon the status of any child should be denominated a conviction, it is my opinion that such individual should not be disqualified for answering "no" to question 5 of the application regarding convictions, provided he correctly reports upon the application any adjudication of not innocent. It follows that this should not be construed as falsifying the application in any case in which the applicant properly supplies the information regarding any offense of which he has been adjudged not innocent.

MOTOR VEHICLES—Operator's License—Operation during period of revocation—Accused must have notice of revocation.

CRIMINAL PROCEDURE—Motor Vehicle Operator's License—Operating during period of revocation—Accused must have notice of revocation.

April 30, 1963

HONORABLE MARK D. WOODWARD
Judge of the Page County Court

This is to acknowledge your letter of April 16, 1963, in which you request my opinion on the question of whether or not notice of revocation of a driving license is necessary before a conviction can be had on a charge of operating a motor vehicle during the period of revocation or suspension.

The pertinent portion of § 46.1-350 of the Code of Virginia, as amended, is as follows:

"No person resident or nonresident whose operator's or chauffeur's license or instruction permit has been suspended or revoked by any court or by the Commissioner or by operation of law pursuant to the provisions of this title or of § 18.1-59 or who has been forbidden as prescribed by law by the Commissioner, the State Corporation Commission, the State Highway Commissioner, or the Superintendent of State Police, to operate a motor vehicle in this State shall thereafter drive any motor vehicle in this State unless and until the period of such suspension or revocation shall have terminated."

Although the order of revocation or suspension is effective and enforceable on the date it is issued by the Commissioner of the Division of Motor Vehicles, notice thereof to the accused is essential before a conviction can be had under this section. Whether there has been notice to the individual (accused) is a fact which must be determined by the Court.

I am, therefore, of the opinion that the evidence must show that the accused has had notice before he can be convicted under § 46.1-350 or a charge of operation of a motor vehicle during the period of revocation or suspension.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Operators' License—Original of license issued to person under eighteen to be mailed to county court judge.

COURTS—County Court Jurisdiction—Extends throughout county, including towns.

Honorable W. W. Fields, Sr.
Mayor of the Town of Richlands

July 27, 1962

This is in response to your letter of July 19, 1962, inquiring whether the original operator's license issued a person under eighteen years of age should be mailed to you as mayor or trial justice of the town of Richlands or to the county judge, under Section 46.1-375.1 of the Code of Virginia.

The applicable portion of the named statute provides that all such licenses shall be forwarded by the Division of Motor Vehicles "to the judge of the municipal or county court having jurisdiction over traffic cases in the city, county or town in which the person to be licensed resides." (Emphasis supplied.) Chapter 3 of Title 16.1 of the Code of Virginia, which governs courts not of record classified as municipal courts includes certain city and town courts within this classification and excepts certain others. Within this exception are the courts for which provision is made by Chapter 5 of Title 16.1 which are classified by Section 16.1-70 thereof, the pertinent portion of which is as follows:

"All existing courts in cities and towns created under former § 16-129, and all similar courts created under the provisions of municipal charters, which courts are presided over by mayors, justices of the peace, police justices or other trial officers however designated and the jurisdiction of which is limited to cases involving violations of city or town ordinances or of cases instituted for the collection of city or town taxes or assessments or other debts due and owing to such city or town, are hereby continued with the same jurisdiction and powers heretofore conferred upon them and shall, on and after July 1, 1956, be designated and known as the police courts of the respective cities and towns. The trial officer presiding over each such court shall thereafter be known as the police justice of such city or town. Unless otherwise specially provided such police courts shall not be included in the designation 'courts not of record' as used in this title, nor shall this title be construed to repeal the provisions of municipal charters with respect to such courts except to the extent that such provisions are in conflict with this title."

The charter provided for the town of Richlands in the County of Tazewell, by Chapter 276, Acts of Assembly, approved March 15, 1954, created the office of police justice for the Town of Richlands. The jurisdiction of the police justice is directed to all "offenses against any ordinance of the town of Richlands, Virginia," excluding, however, the trial of persons under eighteen years of age. Considering the provisions of this charter in conjunction with the cited sections of Title 16.1, including the quoted portion of § 16.1-70, supra, it appears evident that the court over which you preside, although having jurisdiction over traffic cases, is a police court limited to cases involving the violation of the town ordinances or the collection of town taxes, as opposed to general jurisdiction, and does not fall within the statutory classification of "municipal courts."

Under Sections 16.1-37 and 16.1-123 of the Code of Virginia, the county court has territorial jurisdiction over the entire county and exclusive original jurisdiction within any city lying within the county, when such city does not have a municipal court with general civil and criminal jurisdiction, for the trial of all misdemeanors arising therein except offenses against the ordinances of the city. This includes jurisdiction for the trial of traffic cases and certainly those involving
the violation of any State law, even though the violation may have occurred within the town. It is, therefore, my opinion that under the provisions of Section 46.1-375.1 the Division should forward such licenses to the judge of the county court of Tazewell.

MOTOR VEHICLES—Operator’s License—Suspension for Reckless Driving (exceeding 65 or 75)—Section 46.1-423 mandatory.

MOTOR VEHICLES—Operator’s License—No abatement of mandatory suspension under § 46.1-423.

September 14, 1962
HONORABLE R. H. PETTUS
Commonwealth’s Attorney of Charlotte County

This is in reply to your letter of September 7, 1962, which reads as follows:

“Several weeks ago our officers apprehended two young boys driving their cars approximately 100 MPH on a two-lane road. They had been charged with racing, but the Court found them guilty only of reckless driving and revoked their permits for four months each.

“One of the boys has paid up his fine and cost and has accepted the four months revocation. The other boy has asked the Judge to reconsider his case, pointing out that he was a truck driver and needed his permit in his work. The Judge has been asked to take his permit for eight months for driving a car, but, in the meantime, permit him to drive a truck only, in place of the four-month complete revocation.

“Is the Judge authorized to do this under that section of the Code which calls for a mandatory revocation of an operator’s license when one is convicted of exceeding the speed of 75 MPH, Section 46.1-423?”

Section 46.1-423, Code of Virginia (1950), as amended, provides, in part, as follows:

“When any person shall be convicted of reckless driving for exceeding a speed of sixty-five or seventy-five miles per hour as the case may be upon the highways of this State under § 46.1-190 (i) or § 46.1-190 (1), then in addition to any other penalties provided by law, except in those cases for which revocation of licenses is provided in § 46.1-417, the operator’s or chauffeur’s license of such person shall be suspended by the court or judge for a period of not less than sixty days nor more than six months. In case of conviction the court or judge shall order the surrender of the license to the court where it shall be disposed of in accordance with the provisions of § 46.1-425.”

This section makes it mandatory upon conviction that the license be suspended by the court or judge for “not less than sixty days nor more than six months,” except in those cases for which revocation of licenses is provided in § 46.1-417. The exception applies to the second or additional conviction of offenses committed within a period of twelve consecutive months. In such case the Commissioner of the Division of Motor Vehicles is required to revoke the license for a period of one year. In either event, their appears no statutory provision for anything less than complete suspension of the license to drive during the mandatory suspension period. It is my opinion that an abatement would be completely incongruous with a mandatory suspension and, accordingly, I must answer your question in the negative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Radar—Unlawful use under Section 46.1-198.1 not grounds for confiscating such devices.

January 11, 1963

HONORABLE EUGENE A. LINK
Commonwealth's Attorney for the City of Danville

This is in reply to your letter of December 29, 1962, in which you ask whether there is any law permitting the authorities to confiscate, in lieu of returning to the owners, radar detecting devices found on motor vehicles in violation of § 46.1-198.1, Code of Virginia (1950), as amended.

This is a new section enacted under Chapter 125, Acts of Assembly of 1962, and the violation constituting a misdemeanor thereunder is expressed in the following quoted portion of the statute:

"It shall be unlawful for any person to operate a motor vehicle upon the highways of this State when such vehicle is equipped with any device or mechanism to detect the emission of radio microwaves in the electro-magnetic spectrum, which microwaves are employed by police to measure the speed of motor vehicles upon the highways of this State for law enforcement purposes; it shall be unlawful to use any such device or mechanism upon any such motor vehicle upon the highways."

Considering the language of this section, it is apparent that the operation upon the highways of a motor vehicle equipped with such radar detecting device, as well as the use of such device upon a motor vehicle upon the highways, constitutes a violation. It is equally clear that the possession or use of such devices except upon a motor vehicle upon the highways, if there be other uses, would not constitute a violation under this section.

There is no authority under this section for confiscating such equipment. Neither do I find any other statute which would authorize the confiscation of these devices on the basis of a violation under this section or to prevent the occurrence or recurrence of such violation, and, accordingly, my answer to your question is in the negative.

MOTOR VEHICLE—Reciprocity—When applicable.

August 7, 1962

HONORABLE SAMUEL J. BREEDING, JR.
Member, House of Delegates

This is in reply to your letter of July 24, 1962, which reads as follows:

"Attached hereto is Buchanan County Ordinance pertaining to Section 46.1-65 Code of Virginia with regard to motor vehicle license for Buchanan County. It has been brought to my attention that in a number of cases residents of the state of West Virginia, Kentucky and bordering Virginia counties have been made to comply with this ordinance.

"One particular case, a West Virginia coal trucker transports his coal from West Virginia to Buchanan County has been cited and fined for not having Buchanan County tags although he has complied with the requirements of West Virginia and the Virginia interstate Commerce Tags. Other cases of non-residents bearing foreign plates that work in Buchanan County, but drive back to their homes each day, being forced to purchase Buchanan County tags are numerous.

"I have been asked by numerous people and organizations in Buchanan County to contact you and ask for an official ruling as to the constitutionality of this ordinance and to what limits this ordinance gives Buchanan County in regard to these out of state and other Virginia
The way the attached ordinance is being enforced in Buchanan County has jeopardized the trade relations between adjoining states and adjoining counties with Buchanan County.

I have examined the ordinance pertaining to local license tax upon motor vehicles which was adopted by the Board of Supervisors of Buchanan County pursuant to the provisions of §§ 46.1-65 and 46.1-66 of the Code of Virginia. The ordinance, on its face, seems to be in compliance with the authority granted by these statutes. Whether or not in the enforcement of this ordinance a local license tax has been required on motor vehicles that are not subject to the tax depends on the facts in each case.

In considering whether or not a motor vehicle is subject to the tax, the following language, contained in § 46.1-65, is pertinent:

"The amount of the license fee or tax imposed by any county, city or town upon any class of motor vehicles, trailers or semitrailers shall not be greater than the amount of the license tax imposed by the State on vehicles of like class."

This provision makes it necessary to examine the Fourteen-State Reciprocal Agreement, which was entered into pursuant to the provisions of § 46.1-20 of the Code. The States of Kentucky and West Virginia and Virginia are parties to this agreement. The effect of this agreement was considered by this office in an opinion to Honorable Junie L. Bradshaw on June 21, 1962. I am enclosing a copy of this opinion. Although this opinion related to a corporation that is chartered in this State, the principles therein set forth are applicable to individuals and nonresident corporations, as will be observed from an examination of the provisions of the agreement as set out in the opinion of June 21, 1962, commencing at the top of page 3.

At my request, the Division of Motor Vehicles is mailing you two copies of the Fourteen-State Reciprocal Agreement.

Specifically, with respect to your inquiry as to the constitutionality of the ordinance, I am of the opinion that it is constitutional. Its enforcement, however, must be in accord with the terms of the statutes in question and the Reciprocal Agreement.

Those vehicles of the class referred to in the second paragraph of your letter would not be liable for the license tax imposed by the ordinance in question. I call attention, however, to paragraph (i), page 3 of the Reciprocal Agreement relating to tractors or trucks with more than two axles. These must be registered with the State Corporation Commission of Virginia and the sticker therein mentioned must be acquired.


MOTOR VEHICLES—Reckless Driving—Exceeding speed limit of 65 mph—To what vehicles applicable.

CRIMES—Reckless Driving—Exceeding speed limit of 65 mph—To what vehicles applicable.

HONORABLE JOHN ALDERMAN
Commonwealth's Attorney of Carroll County

May 29, 1963

This is in reply to your letter of May 22, 1963, in which you request my opinion on the construction of the statute which provides that a person who drives certain
vehicles at a speed in excess of 65 miles per hour shall be guilty of reckless driving.

Specifically, you want to know if the law applies to a tractor-trailer or only to one vehicle towing another vehicle. This statutory provision is found in § 46.1-190, Code of Virginia (1950), as amended, the pertinent portion of which is as follows:

“(L) Drive a truck or tractor or tractor-truck, or a motor vehicle being used to tow a vehicle designed for self-propulsion, or a house trailer, or combination of vehicles designed to transport property, upon the highways of this State at a speed in excess of 65 miles per hour.”

An examination of the phraseology and punctuation used in the quoted paragraph of the statute compels me to interpret it as applicable to any one of the named vehicles or combinations of vehicles as segregated therein. In other words, a person shall be guilty of reckless driving who shall drive either a truck or tractor or tractor-truck upon the highways of this State at a speed in excess of 65 miles per hour. In order to constitute the crime of reckless driving, it is not necessary that either of these three vehicles tow or draw another vehicle. Otherwise, it would be superfluous to specify these three types of vehicle, since each is a motor vehicle and the ensuing clause reads, “or a motor vehicle being used to tow a vehicle designed for self-propulsion.” The remainder of the paragraph applies to a motor vehicle towing a house trailer, or any combination of vehicles designed to transport property.

The consideration of related statutes sheds additional light on the legislative intent. In this connection, your attention is invited to § 46.1-193, Code of Virginia (1950), as amended, which states the maximum and minimum speed limits. Under paragraph (1) (a) of that section, when the maximum limit is 65 miles per hour for a passenger motor vehicle or certain other motor vehicles it is only 55 miles per hour “if the vehicle is a truck, road tractor, tractor-truck or combination of vehicles designed to transport property, or is a motor vehicle being used to tow a vehicle designed for self-propulsion, or a house trailer.” Likewise, under paragraphs (1) (b) and (1) (c) respectively, the maximum speed limit for the vehicles and combinations named in § 46.1-190 (L) is only 50 miles per hour on highways on which the maximum is 60 miles per hour for other motor vehicles and only 45 miles per hour on highways on which the maximum is 55 miles per hour for other motor vehicles. Thus, the maximum lawful highway speed limit for each of the vehicles or combinations of vehicles named in § 46.1-190 (L) is 10 miles per hour less than the maximum limit for other motor vehicles. The same subject matter appears in both §§ 46.1-190 (L) and 46.1-193 (1) (a), (b) and (c) and it was obviously the intention of the legislature to follow the same standards in providing in § 46.1-190 (L) that a speed in excess of 65 miles per hour would constitute reckless driving, whereas, to constitute a similar crime for other motor vehicles, the speed must be in excess of 75 miles per hour. See § 46.1-190 (i). Undoubtedly, the size and weight of the vehicle and the required stopping distances were factors setting the statutory speed limits as well as the specific instances of reckless driving.

In consideration of the foregoing, it is my opinion that § 46.1-190 (L), quoted herein, applies to a tractor-trailer driven upon the highways of this State at a speed in excess of 65 miles per hour, and to a tractor, tractor-truck or truck so driven while not towing or drawing another vehicle, as well as to a motor vehicle towing another vehicle, or combination of vehicles designed to transport property.
MOTOR VEHICLES—Registration—Leased vehicles.

HONORABLE LANDON R. WYATT
Member, State Senate

This is in reply to your letter of March 15, 1963, in which you pose the question of whether, in view of § 46.1-150 of the Code, automobiles leased to individual customers for their personal use, for which the compensation is a stipulated monthly payment to the owner, should be registered as private motor vehicles or treated as vehicles operated for compensation.

You point out that if the lessees owned the vehicles and used them for identical purposes, the registration fee for each vehicle would be ten dollars per year. The registration fee of ten dollars for a private motor vehicle, as prescribed by paragraph (1) of § 46.1-149, Code of Virginia (1950), as amended, applies only if the vehicle "is not used for the transportation of passengers for compensation and is not kept or used for rent or for hire, or is not operated under a lease without a chauffeur." The vehicles in question, then, could not be classified under this subsection as private motor vehicles since they are operated under a lease without a chauffeur. In regard to the use of a motor vehicle for rent or for hire, your attention is invited to § 46.1-1, paragraph (35), Code of Virginia (1950), as amended, which is as follows:

"'Operation or use for rent or for hire', etc.—The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a 'truck lessor' as defined herein."

In addition, § 46.1-1, paragraph (18), in defining the word "owner" states, in part, that "when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle and the vehicle shall be subject to such requirements of this title as are applicable to vehicles operated for compensation; * * *" (Italics supplied).

Section 46.1-150, Code of Virginia (1950), as amended, reads as follows:

"The fees required by § 46.1-149 (a) (6) and (7) to be paid for certificates of registration and license plates for the operation of motor vehicles used for rent or hire shall not be required for the operation of any motor vehicle with a normal seating capacity of not more than six adult persons including the driver while used not for profit in transporting persons who, as a common undertaking, bear or agree to bear all or a part of the actual costs of such operation; and for the purpose of § 46.1-149 every such motor vehicle shall be treated as a private motor vehicle for which the fee for the annual certificate of registration and license plates shall be ten dollars."

The language of this section leads me to the conclusion that it has reference to private passenger automobiles, or motor vehicles with normal seating capacity of not more than six adult persons, which transport one or more passengers on an actual cost (not for profit) basis, such as the transporting of fellow workers or others traveling the same approximate route as the owner who "chip in" to defray the cost. The statutory elements of "not for profit" and "actual cost" would negate any idea of a lease to individual users, one of the primary purposes of such lease arrangement being profit to the owner.
The portion of § 46.1-149, Code of Virginia (1950), as amended, under consideration here, reads as follows:

“(a) The annual registration fees for motor vehicles, trailers and semitrailers, designed and used for the transportation of passengers upon the highways of this State are:

“(6) 80¢ per hundred pounds of weight or major fraction thereof for each motor vehicle, trailer or semitrailer kept or used for rent or for hire or operated under a lease without chauffeur for the transportation of passengers. This subsection does not apply to vehicles used as common carriers.”

Considering the several related statutes and subsections quoted herein, it is manifest that the controlling point of the situation is not the fact that the lessees use the vehicles as they would their own private automobiles. The classification of these vehicles, insofar as registration fees are concerned, is determined by the use and purposes to which the owner subjects them. As previously pointed out, the vehicles under consideration can neither qualify as "private motor vehicles" under § 46.1-149, paragraph (1), nor as being used "not for profit" under § 46.1-150. They are operated under lease without chauffeurs and under the statutory definition of "for rent or for hire" or "for compensation". Under § 46.1-1, paragraph (18), they are subject to the requirements applicable to vehicles operated for compensation. It is, therefore, my opinion that paragraph (6) of § 46.1-149, quoted above, is the proper section for determining the registration fees for these vehicles.

MOTOR VEHICLES—Registration—Reciprocity—When applicable.

HONORABLE WILLIAM F. STONE
Member of the Senate

This is in reply to your letter of January 7, 1963, in which you pose several questions which have arisen in the study being undertaken by the Highway Study Commission, of which you are Chairman. In setting forth your questions you have cited several illustrations of "for hire" vehicular operations, and desire my view regarding registration and licensing requirements in connection with such operations.

Most of your illustrations and inquiries involve a relatively few major principles which underscore any consideration of registration and licensing of motor vehicles, as well as taxes relating to the operation of motor vehicles in Virginia.

The general rule on registration requirements (with the Division of Motor Vehicles) is set forth in § 46.1-41, Code of Virginia (1950), as amended. That section reads as follows:

"Except as otherwise provided in §§ 46.1-42 through 46.1-49, 46.1-119 and 46.1-120 every person, including every railway, express and public service company, owning a motor vehicle, trailer or semitrailer intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title therefor."

The expressed exceptions in the foregoing section to the general rule are codified in §§ 46.1-42 through 46.1-49, and 46.1-119 and 46.1-120 of the Code.
These exceptions relate principally to temporary registration, vehicles used for particular purposes, and vehicles operated by government, vehicle manufacturers and dealers. Other exceptions, which are not expressed in § 46.1-41 of the Code, are certain foreign owned vehicles operated in Virginia under reciprocal arrangements entered into pursuant to § 46.1-20 and §§ 46.1-131 through 46.1-139 (Article 7, Chapter 3, Title 46.1) Code of Virginia.

Worthy of note is the prohibition in § 46.1-20 of the Code against the granting of reciprocity with respect to the road tax imposed by Article 12, Chapter 12, Title 58, Code of Virginia.

The foregoing may be summarized by stating that as a general rule, except as expressly otherwise provided, any vehicle operated upon the highways of Virginia is subject to registration in this State, whether or not owned by Virginia residents. There are instances in which foreign owned vehicles are expressly excepted, but only under conditions specified in the statutes or reciprocal arrangements providing for such exceptions.

Generally speaking, the granting of reciprocity between states simply means that foreign owned vehicles operating in interstate commerce in Virginia are not required to be registered with the Virginia Division of Motor Vehicles if the state of the owner's residence extends a like privilege to Virginia residents. Residents of Virginia must register their vehicles with the Virginia Division of Motor Vehicles if such vehicles are to be operated in Virginia, irrespective of the nature of the operation. Pertinent to this requirement is § 46.1-1(16) of the Code of Virginia, which defines "nonresident" as follows:

"'Nonresident'—Every person who is not domiciled in this State, except:

'(a) Any foreign corporation which is authorized to do business in this State by the State Corporation Commission shall be deemed a resident of this State for the purpose of this title; provided, however, that in the case of corporations incorporated in this State but doing business without the State, only such principal place of business or branches located within this State shall be dealt with as residents of this State.

'(b) A person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days, shall be deemed a resident for the purposes of this title.

'(c) A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration, shall be deemed a resident for the purposes of this title."

The proviso in paragraph (a) of the foregoing definition recognizes the possibility that a Virginia resident corporation may be considered a nonresident for purposes of Title 46.1 of the Code. In such event, only the principal place of business or branches located within the State shall be dealt with as residents of this State.

The reciprocal agreement currently existing between Virginia and thirteen other states, (commonly referred to as the Fourteen-State Reciprocal Agreement) in so far as "for hire" vehicles are concerned, extends the exemption from registration to persons, firms and corporations maintaining a principal place of business in one or more reciprocating states when operating interstate. In the event the owner of a motor vehicle maintains a principal place of business in more than one of the reciprocating states, the owner may operate a vehicle which is properly licensed where based between the other reciprocating states. The agreement provides for the reciprocating authorities to agree on the base of the vehicle.

In this connection, you first inquire as to the interpretation of the term "based."

While I am aware of no judicial definition of this term, the current reciprocal agreement provides that in determining the base of a vehicle consideration must be given to the place from which the vehicle leaves and to which it returns in its
normal operation. I should think this term means the place where the vehicle is usually garaged, serviced, from whence it normally begins and terminates operations, and the place where it normally rests when not in operation.

Turning now to the first six illustrations set forth in your letter, I quote as follows:

"B. What should be the license and registration requirements for 'For Hire Vehicles' owned by Virginia corporations or by Virginia citizens:

1. When the vehicle is based at a location in Virginia and operates solely in interstate commerce?
2. When the vehicle is based at a location in Virginia and operates solely in intrastate commerce in Virginia?
3. When the vehicle is based at a location in Virginia and operates in interstate commerce and also operates in intrastate commerce in Virginia?"

In each of the foregoing illustrations I am of the opinion that the vehicles are subject to all Virginia licensing and tax provisions, whether owned by Virginia citizens, firms or corporations.

The remaining illustrations are considered separately:

"4. When the vehicle is based at a location in a foreign state and operates solely in interstate commerce, but not in Virginia?"

The vehicle here is not subject to Virginia license requirements, since it is not to be operated upon Virginia highways.

"5. When the vehicle is based at a location in a foreign state and operates solely in interstate commerce, including trips into Virginia?"

Vehicles in this category are subject to Virginia registration requirements, unless it can be shown that they are owned by corporations which are classified as "nonresident" within the definition of § 46.1-1(16) of the Code, and are based and licensed in a foreign state which is a party to a reciprocal agreement with Virginia. State of New Jersey v. Garford Trucking, Inc., 4 N. J. 346, 72 A. 2d 851; also, annotation in 16 A.L.R. 2d 1414.

As indicated above, reciprocity is intended to apply to foreign owners, not residents of Virginia, and then only if the foreign state extends a like privilege to Virginia residents. The privilege does not extend to vehicles owned by residents of Virginia except in those isolated cases hereinabove discussed. For a more thorough dissertation regarding this category, see the Report of the Attorney General (1961-1962), p. 166.

"6. When the vehicle is based at a location in a foreign state and operates in interstate commerce and also operates in intrastate commerce in Virginia?"

I am of the opinion that such vehicles are subject to the Virginia registration requirements, since there is no exception, even for foreign owned vehicles, for intrastate operations in this State.

Turning now to a consideration of the registration requirements for vehicles owned by foreign corporations or foreign citizens, I quote from your letter as follows:

"C. What should be the license and registration requirements for 'For Hire Vehicles' owned by foreign corporations or by foreign citizens: (NOTE: The following conditions are identical to those listed above, but are presented to state the problem clearly)."
"1. When the vehicle is based at a location in Virginia and operates solely in interstate commerce?

"2. When the vehicle is based at a location in Virginia and operates solely in intrastate commerce in Virginia?

"3. When the vehicle is based at a location in Virginia and operates in interstate commerce and also operates in intrastate commerce in Virginia?"

In each of the three illustrations the vehicles must comply with Virginia registration requirements. Like the operations by Virginia residents, all motor vehicles owned by foreigners must be registered in Virginia if they are to be operated on Virginia highways, unless it can be shown that such vehicles are excepted by statute or a reciprocal arrangement between Virginia and the state of residence of the owner. There is no exception simply because of the interstate nature of the operation, for it is well recognized that each state may require registration and the payment of road tax as a condition to operating a motor vehicle in the state, even though engaged in interstate commerce. See, Capitol Greyhound Lines v. Brice, 339 U.S. 542, 94 L. ed. 1053; Riss and Company v. Bowers, 182 N.E. 2d 871; and annotation in 17 A.L.R. 2d 421.

The current Fourteen-State Reciprocal Agreement provides for exceptions for foreign owned vehicles engaged in interstate operations only, and then only if properly licensed in a reciprocating state.

The fourth illustration in this classification reads as follows:

"4. When the vehicle is based at a location in a foreign state and operates solely in interstate commerce, but not in Virginia?"

Here again, like the Virginia resident operating in interstate, but not in Virginia, there is no requirement for registration of a motor vehicle in Virginia which does not operate upon Virginia highways.

"5. When the vehicle is based at a location in a foreign state and operates solely in interstate commerce, including trips into Virginia?"

This illustration is the clearest in which the reciprocity agreement applies, since it is manifestly a foreign vehicle operating in interstate commerce. If there is no agreement between Virginia and the state of the vehicle owner's residence, then it must be registered in Virginia, even though registered in some other state.

"6. When the vehicle is based at a location in a foreign state and operates in interstate commerce and also operates in intrastate commerce in Virginia?"

As pointed out hereinabove, neither the Virginia statutes nor the reciprocal agreement contemplates license exceptions for vehicles engaged in intrastate operations in Virginia, whether or not foreign owned. It is, therefore, necessary for such vehicles to be registered in Virginia, even though already licensed elsewhere.

"D. In each of the examples cited above under 'B' and 'C' please give your opinion as to whether the Division of Motor Vehicles should require Virginia license tags or accept foreign license tags, and whether the State Corporation Commission should register the vehicle with an identification marker or a classification plate."

The term "registration" and "licensing" are generally used interchangeably when speaking of registration with the Division of Motor Vehicles. Virginia license tags are simply indicia of registration, and in every instance in which Virginia registration with the Division of Motor Vehicles is required, the
appropriate license tags should be displayed. A foreign license tag is evidence of compliance with registration requirements of another state and may be accepted for such purposes in those cases in which this compliance becomes relevant.

The foregoing is not to be confused with registration requirements administered by the Virginia State Corporation Commission, for all for-hire vehicles operating in Virginia must be registered with the State Corporation Commission, whether foreign or domestic. In all cases in which reciprocity is extended to vehicles which are properly licensed elsewhere, such equipment must be registered with the State Corporation Commission by virtue of §§ 56-304.1 and 56-304.2, Code of Virginia, as well as paragraph VI of the Fourteen-State Reciprocal Agreement. The State Corporation Commission issues the appropriate identification marker for such vehicles. As to vehicles which must be registered with the Virginia Division of Motor Vehicles, there must be displayed the appropriate State Corporation Commission classification plate.

To facilitate summarizing the foregoing, the following table reflects my views as to registration requirements, both with the Division of Motor Vehicles and the State Corporation Commission for commercial vehicles:

### B. Vehicles owned by Virginia citizens or Virginia corporations

<table>
<thead>
<tr>
<th>Register with D.M.V.</th>
<th>S.S.C. (Classification)</th>
<th>S.S.C. (Identification)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>3. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4. No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>5. (a) Yes, unless § 46.1-1 (16) and Reciprocal Agreement apply</td>
<td>(a) Yes</td>
<td>(a) No</td>
</tr>
<tr>
<td>(b) No, if § 46.1-1(16) and Reciprocal Agreement apply</td>
<td>(b) No</td>
<td>(b) Yes</td>
</tr>
<tr>
<td>6. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

### C. Foreign Owned:

<table>
<thead>
<tr>
<th>Register with D.M.V.</th>
<th>S.S.C. (Classification)</th>
<th>S.S.C. (Identification)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>3. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4. No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>5. (a) No, (if Reciprocal Agreement applies)</td>
<td>(a) No</td>
<td>(a) Yes</td>
</tr>
<tr>
<td>(b) Yes, (if no Reciprocal Agreement applies)</td>
<td>(b) Yes</td>
<td>(b) No</td>
</tr>
<tr>
<td>6. Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

Your final inquiries relate to the tax imposed by § 46.1-135 of the Code. Your letter reads as follows:

"E. Under what circumstances shall the Weight-Distance Tax Statute, § 46.1-135, be enforced? This statute apparently is applied only as a threat to other states who might levy so-called third level taxes on Virginia trucks, but it has not been enforced against trucks from those states which do employ third level taxes. Is it legal for Virginia to enforce a tax levy on trucks from one foreign state while excusing similar trucks from other foreign states? Is there statutory or other authority for suspending the application of § 46.1-135 and, if so, where is such authority found?"
The tax which is imposed by § 46.1-135 of the Code is subject to reciprocal arrangements which may be entered into by the Commissioner of the Division of Motor Vehicles with the approval of the Governor. This authority is provided in § 46.1-137 of the Code, which reads as follows:

"Notwithstanding the other provisions of this article, the Commissioner, with the consent of the Governor, may extend to the owners of foreign vehicles operated in this State the same privileges which are granted by the state of the United States or foreign country wherein the owners of such foreign vehicles are residents to residents of this State operating vehicles in such state of the United States or foreign country."

MOTOR VEHICLES—Seat Belts—Must be installed on 1963 models irrespective of year sold.

August 10, 1962

HONORABLE Tom Frost
Member, House of Delegates

This is in reply to your letter of August 7, 1962, in which you make the following inquiries regarding Chapter 357 of the Acts of Assembly (1962):

"Does the bill require that all cars of the 1963 label be required to have seat belts?"

"Will it be necessary to install seat belts on all cars which are manufactured after January 1, 1963?"

By enactment of Chapter 357, § 46.1-309.1 was added to the Code of Virginia, which section reads as follows:

"§ 46.1-309.1. (a) No motor vehicle, designed and licensed primarily for private vehicular transportation on the public highways, and manufactured for the year nineteen hundred sixty-three or for subsequent years, shall be approved on inspection of such motor vehicle under the provisions of article 10 (§ 46.1-315 et seq.), chapter 4 of this title, unless the front seats thereof be equipped with safety belts or safety harnesses of a type approved by the Superintendent of Motor Vehicles.

(b) Failure to use such safety belts or harnesses after installation shall not be deemed to be negligence."

I believe this section requires the installation of seat belts in vehicles manufactured as 1963 models, irrespective of the time of sale or operation on the highways. Had the General Assembly intended otherwise, it would have been a simple matter to have required installation of such belts on vehicles manufactured "after January, 1963," rather than requiring them on vehicles manufactured "for the year 1963 or for subsequent years."

MOTOR VEHICLES—Uninsured Motorists—Operating under temporary license.

November 15, 1962

HONORABLE Charles T. Turner
Assistant Commonwealth’s Attorney Pittsylvania County

This is in reply to your letter of November 7, 1962, in which you ask my opinion regarding the legality of a person operating a motor vehicle on the high-
ways under a temporary license plate issued under the provisions of § 46.1-124, Code of Virginia (1950), as amended, when such vehicle is not covered by any policy of liability insurance and the uninsured motor vehicle fee of twenty dollars has not been paid.

In answering this same question, my predecessor in office, in a letter dated January 8, 1962, addressed to the Honorable H. Ratcliffe Turner, Commonwealth's Attorney for Henrico County, expresses the opinion that a person operating a motor vehicle under the circumstances which you describe would not be guilty of a violation of § 46.1-167.3 of the Code of Virginia. This section states what constitutes a criminal violation under Article 10, Chapter 3 of Title 46.1 relating to uninsured motor vehicles and prescribes the penalty for such violations. A copy of that opinion is enclosed for your information.

In the letter dated October 29, 1962, from the Division of Motor Vehicles, a copy of which you furnished for my consideration, the procedure outlined seems consistent with the views expressed in the enclosed opinion.

MOTOR VEHICLES—Uninsured Motor Vehicle Fee—Becomes payable upon registration of uninsured motor vehicle in Virginia—§§ 46.1-167.1 and 46.1-167.3.

CRIMES—Operating Uninsured Motor Vehicle not Registered in Virginia—Not a violation under §§ 46.1-167.1 and 46.1-167.3.

April 9, 1963

HONORABLE ROBERT I. ASBURY
Commonwealth's Attorney for Smyth County

This is in reply to your letter of April 4, 1963, which reads as follows:

"It is respectfully requested that your office render an opinion on the following: Suppose that a resident of Virginia owns a motor vehicle as defined by Section 46.1-167.2 of the Code of Virginia; that the said motor vehicle is not currently registered; that the said motor vehicle is operated by the owner upon the highways of this state without having first obtained the proper state license plates.

"Based on this set of facts, is the owner aforesaid violating Section 46.1-167.1 or 46.1-167.3 of the Code of Virginia?

"To state the same question another way, do the above mentioned sections of the Code apply only if the motor vehicle in question has been registered in this state for the current year?"

Section 46.1-41, Code of Virginia (1950), as amended, requires that, with certain exceptions not here applicable, every person owning a motor vehicle shall, before the same is operated upon any highway, obtain registration and certificate of title therefor. It seems clear that you have reference to an uninsured motor vehicle, although the word "uninsured" is not found in your letter. Section 46.1-167.1, Code of Virginia (1950), as amended, expresses the requirement for the payment of an uninsured motor vehicle fee as follows:

"In addition to any other fees prescribed by law, every person registering an uninsured motor vehicle, as hereinafter defined, shall pay at the time of registering the same a fee of twenty dollars."

This section imposes a fee of twenty dollars upon every person registering an uninsured motor vehicle. The payment must be made at the time of such
registration. Unlike Section 46.1-41, which requires the registration of a motor vehicle before it is operated upon the highways, this section makes no mention of operation but bases its requirement upon registration under the given circumstances. Section 46.1-167.3 provides that, if during the period for which it is licensed any owner operates or permits the operation of an uninsured motor vehicle on which the fee of twenty dollars required by § 46.1-167.1 has not been paid, such owner "shall be guilty of a misdemeanor punishable as set forth in § 46.1-16." The penalty has reference to the operation of an uninsured motor vehicle which is licensed. This phraseology is different from that used in Section 46.1-167.4 relating to the involvement of such an uninsured motor vehicle in a reportable accident. The latter section refers to an uninsured motor vehicle "subject to registration in this State," whereas the two sections presently under consideration do not employ the term "subject to", which would include those vehicles required by law to be registered in this State, whether so registered or not.

Considering the language of Sections 46.1-167.1 and 46.1-167.3 and related statutes, and particularly the words which I have emphasised, it is my opinion that, under the given facts, the owner is not violating these sections but is violating Section 46.1-41. In my interpretation, Section 46.1-167.1, requiring the payment of the uninsured motorist fee of twenty dollars, and Section 46.1-167.3, providing the penalty for its violation, are contingent upon registering an uninsured motor vehicle in this State.

MOTOR VEHICLES—Weight Violations—Liquidated damages to be assessed for over axle violation, as well as over gross limit.

August 17, 1962

HONORABLE EDWARD STEHL, III
Judge, Caroline County Court

This is to acknowledge receipt of your letter of August 14, 1962, in which you request my opinion as to whether it is proper to assess liquidated damages under § 46.1-342, or any other provision of law, under charges for a vehicle being over the permissible axle weight and, in addition, for such vehicle being over the gross weight limitation.

This precise question is answered in an opinion which appears in the Report of the Attorney General, (1958-1959), Page 211, which held that upon conviction the defendant could be assessed for liquidated damages based upon the gross load and also upon the axle overload. The opinion is embodied in a letter dated September 5, 1958, addressed to the Honorable C. J. Rowell, Judge of the Surry County Court, and I am enclosing herewith a copy of that letter for your information.

It is to be understood, of course, that conviction upon the specific charge is a prerequisite to assessing liquidated damages in any case. No changes have been made in Section 46.1-342, Code of Virginia (1950), as amended, since the aforementioned opinion, based thereon, was given, and expressing my concurrence in that interpretation, I shall answer your question in the affirmative.
NEWSPAPERS—Legal Advertisement—Where to be published.

COUNTIES, CITIES AND TOWNS—Newspaper—Legal advertisements—Where to be published.

HONORABLE JAMES M. THOMSON
Member, House of Delegates

July 10, 1962

Reference is made to your letter of July 9, 1962, which reads as follows:

"Reference is made to my letter of June 19, 1962 and your opinion expressed in your letter of June 22nd. I must apologize for my failure to more clearly state the question for you.

"It was my purpose to try and determine if the Fairfax Journal which is physically published or printed in Alexandria can handle legal advertisements for the jurisdiction of the City of Alexandria. As I mentioned before, the Fairfax Journal has subscribers some of whom are located in the City of Alexandria. It has a second class mailing privilege and this paper is lettered as second class matter at the Post Office in Fairfax County."

I know of no statute which imposes a circulation requirement in determining whether or not a newspaper qualifies for publication of a legal advertisement, except in § 8-81 the paper must have a list of bona fide subscribers.

It is specifically provided in § 8-76 that any notice as is mentioned in §§ 8-51 and 8-54 to a person not residing in Virginia may be served by publication in a newspaper published in the city or county where the proceedings, about which the notice is to be given, are to be held. There is no requirement in § 8-81 that the subscribers to the paper shall necessarily reside in the city where the paper is published.

In my opinion, the newspaper in question is qualified under the statutes to publish legal advertisements in connection with matters pending in the jurisdiction of the courts in the city of Alexandria.

NURSES—Advisory Council on Nursing Training—Meetings—Necessary to meet at least once annually—Calendar year.

HONORABLE DAVID V. CHAPMAN, JR.
Executive Secretary, Advisory Council on Nursing Training

June 28, 1963

This will acknowledge receipt of your letter of June 21, 1963, in which you request my advice as to whether or not under § 32-395 of the Code of Virginia the Advisory Council on Nursing Training is required to hold not less than one meeting per year, even though there is no known business to transact at such a meeting. You also request my advice as to whether or not the Council would be
at liberty to establish either the calendar or State fiscal year for the purpose of
holding such meeting, if necessary. The Code section to which you have referred
specifically provides that "The Governor shall appoint an Advisory Council
on Nursing Training to advise and consult with him in carrying out the ad-
ministration of this chapter . . ." This section further provides: " . . . The
Council shall meet as frequently as the Chairman deems necessary, but not less
than once each year . . ."

The directive with respect to holding meetings of the Council is mandatory
to the extent that the Council is required to meet not less than once during each
year.

I believe it would be appropriate in view of the first sentence of § 32-395 for
the Council to notify the Governor when it will have its meeting and determine
whether or not the Governor has any matters to bring before the Council for
its consideration.

With respect to your second question, the word "year" is defined in § 1-13.33
of the Code, as follows:

"Unless otherwise expressed, the word 'year' shall be construed to
mean a calendar year; and the word 'year' alone shall be equivalent to
the expression 'year of our Lord.'"

Under this definition, the word "year," as used in § 32-395, means a calendar
year.

ORDINANCES—County ordinances applicable within town.

COUNTIES, CITIES AND TOWNS— Ordinance—When county ordinance ap-

plicable within town.

March 26, 1963

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of March 14, 1963, in which you ask my advice
as to whether or not various county ordinances are applicable to and may be
enforced within the corporate limits of the incorporated towns located in the
county of Isle of Wight.

A town is a part of the county in which it is located. In my opinion, county
ordinances, in the absence of some provision to the contrary, are effective and
enforceable within the corporate limits of towns located within the county. There
are certain Code sections which specifically exclude the corporate limits of the
town from the application of a county ordinance. Of course, in those instances,
the ordinances would not be enforceable within the town.

PINE TREE SEED LAW—Not applicable within cities.

February 1, 1963

HONORABLE GEORGE W. DEAN
State Forester

This is in reply to your letter of January 31, 1963, which reads as follows:

"Will you please advise me if the provisions of the so-called 'Seed
Tree Law,' Title 10, Chapter 4, Article 6, are effective in cities and
municipalities, such as the new cities of Chesapeake and Virginia Beach."

In examining Code sections 10-74.1 through 10-83, I cannot find any provision which would support a conclusion that the "Seed Trees" statutes are intended to apply to lands located within the various cities of the State. It will be noted by referring to § 10-79 that it is provided that the Commonwealth's Attorney of the county in which a violation was committed shall prosecute all violators under Article 6 of Chapter 4 of Title 10 of the Code.

While no doubt this legislation is intended to apply to rural or farming properties, it does not appear that there is any way the Department of Conservation and Economic Development could enforce its provisions within the corporate limits of a city.

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PINE TREE SEED LAW—Reserving Number of Trees—Alternative Management Plan—Effect of violation of contract.

October 16, 1962

HONORABLE GEORGE W. DEAN
State Forester

This in in answer to your letter of October 3, 1962, in which you requested my opinion on several questions relating to the interpretation of §§ 10-76, 10-76.1 and 10-83 of Article 6, Chapter 4 of Title 10, Code of Virginia (1950), as amended.

The questions which you pose may be covered thusly:

1. May a person who has submitted to the State Forester, and received approval thereof, a planting, cutting or management plan in accordance with § 10-83 be prosecuted for violation of §§ 10-76 and 10-76.1 for cutting trees and not reserving on the land the number of trees required to be left?

I am of the opinion that such a person cannot be convicted for the violation of §§ 10-76 and 10-76.1, since he is exempted therefrom by the language of these statutes.

2. May a person who has submitted a planting, cutting or management plan to the State Forester and after approval thereof has cut the trees and thereafter abandoned the plan be subjected to prosecution therefor?

Inasmuch as this Article contains no provisions for the prosecution of a person who abandons a planting, cutting or management plan once it has been approved, I am of the opinion that a person who abandons such a plan would not be subject to prosecution therefor.

3. Is the attached form (Form 74—5-62—2M) of the planting, cutting or management plan an enforceable contract? If so, by whom and against whom would it be enforced?

I have reviewed this form and believe that it is an enforceable contract. Inasmuch as action upon the same would be a civil matter, any legal services involved would be rendered and performed by this office. Any legal action which is brought would be against the person or persons executing the agreement.

In view of the conclusions reached above, I do not think it necessary to consider the other questions posed by you.
On December 1, 1960, the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors, held a public hearing and as a result thereof, adopted 'Rules and Regulations Governing the Professional Certification of Landscape Architects in the Commonwealth of Virginia.

"Several questions have arisen concerning the adoption of these rules and regulations and I would appreciate your opinion on the following questions:

1. Is the term 'Architect' as it appears in Section 54-17 of the Code broad enough to include those persons who are engaged in the activities which are defined under the rules and regulations adopted as 'Landscape Architecture'?

2. If your answer to question 1 is in the affirmative, is it possible under the provisions of Chapter 3 of Title 54 of the Code of 1950, for one to be licensed as a Landscape Architect and yet not be permitted to perform the other services which are usually associated with the profession of Architecture?

3. If your answer to question 1 is in the affirmative, does the adoption of the rules and regulations referred to constitute a constitutional exercise of the police power in view of the exceptions which are made in the rules?

"I am enclosing for your convenience, a copy of the rules and regulations which were adopted. I also call to your attention the fact that Chapter 3 of Title 54 contains no definition of the term 'Architect' and as I have normally understood the meaning of the term, it would not embrace the activities covered by these rules and regulations. It appears to me that the Board has greatly extended the meaning of the term 'Architect' as adopted by the General Assembly."

Subsequently, by letter dated March 25, 1963, you state as follows:

"The basic question on which I desire your opinion is whether the Virginia State Board possesses the authority to adopt the rules and regulations which have been adopted. If this question is answered in the negative, it would be unnecessary for you to answer any of the further questions set forth in my letter of March 7th."

In my opinion, the Board does not possess the power to create by regulation the category of "Landscape Architect" as distinguished from "Architect" as used in its broadest sense. Such power, in my opinion, may only be granted by a legislative amendment to the statutes involved.

Section 54-25 authorizes the Board to make all necessary rules and regulations, not inconsistent with Chapter 3, Title 54. The regulation under consideration is inconsistent with the provisions of said chapter in that it purports to extend the powers of the Board beyond those specifically delegated by statute. ....

Section 54-29, pertaining to the qualifications of applicants under Chapter 3, Title 54, reads as follows:

"In determining the qualifications of applicants for certification as
architects, a majority vote of the architect members of the Board only shall be required. In determining the qualifications of applicants for certification as professional engineers, a majority vote of the engineer members of the Board only shall be required; and in determining the qualifications of applicants for certification as land surveyors, a majority vote of the land surveyor members of the Board only shall be required.

"The Board may give examinations and issue certificates for practice in a special branch in any of the general heads of the professions covered by this chapter."

The regulation under consideration was promulgated by the Board under the assumption that the terminal paragraph of § 54-29 authorizes such action. This provision first appeared by an amendment to Section 7 of the Act by the enactment of Chapter 331, Acts of 1938. The text of the amendment, insofar as it is material to this opinion, would, except for the deletion made by the adoption of the 1950 Code, make § 54-29 read as follows:

"... In determining the qualifications of applicants for certification as architects, a majority vote of the architect members of the board only shall be required; in determining the qualifications of applicants for certification of professional engineers, a majority vote of the engineer members of the board only shall be required; and in determining the qualifications of applicants for certification as land surveyors, a majority vote of the land surveyor members of the board only shall be required. Provided, however, that any time prior to January first, nineteen hundred and forty any citizen who has been practicing in this State not less than five years prior to the enactment of this statute in any special branch of engineering coming under the head of a general branch covered by this act shall, upon satisfying the board as to his qualifications from work actually accomplished in that special branch, be given a certificate without examination permitting him to practice in that special branch; and the board may give examinations and issue certificates for practice in a special branch in any of the general heads of the professions covered by this statute."

The underscored language was deleted by the 1950 Code Revisors for the obvious reason that the "grandfather clause" was out of date. This portion of the amendment, however, throws some light upon the purpose of the terminal sentence, which is now the terminal paragraph of § 54-29. The "grandfather clause" exempted from examination any citizen who had been practicing in the State for not less than five years prior to the enactment of the amendment in any special branch of engineering coming under the head of a general branch of engineering covered by the Act. In the definitions (Section 12 of the Act) the definitions are stated as follows:

"The term architect, as used in this act, shall be deemed to cover an architect or an architectural engineer. The term professional engineer, as used in this act, shall be deemed to cover a civil engineer, mechanical engineer, electrical engineer, mining engineer, metallurgical engineer, or a chemical engineer. Land surveying as covered by this act refers only to surveys for the reestablishment of land boundaries and the subdivision of land and such topographic work as may be incident thereto, the making of plats and maps and the preparing of descriptions of the lands so surveyed or investigated."

It will be noted that the definitions relating to "Architect" and "Professional Engineer" have not been changed since the passage of the Act of 1938. The
branches of these two professions are—two under the heading of Architect and six under the heading of Professional Engineer.

The “grandfather clause” in the 1938 amendment related to the six special branches of Professional Engineering as set out in the statute. In that portion of the amendment the term “Professional Engineer” was designated as a “general branch covered by this act”—that is, general branch of engineering only. The terminal sentence of the Act—now the final paragraph of § 54-29—related to and authorized the Board to give examinations and issue certificates, not only for the general profession as covered by the Act, namely, Architect, Professional Engineer and Land Surveyor, but in any special branch under the heading of the profession covered by the act. The same reasoning must apply to this language as applies to the language used in the “grandfather clause”—that is, the branches subject to that clause are those mentioned in the definitions contained in § 54-17. I am unable to accept the view that the final paragraph of § 54-29 is intended to give the Board the authority to create by regulation branches of the three general professions covered by the Act. The branches are spelled out in the statute.

This language appearing in the final paragraph of § 54-29 is appropriate because of the provisions of § 54-26 with respect to the giving of examinations and the issuance of certificates; of § 54-27 relating to who is required to obtain a certificate; of § 54-28 relating to qualifications of applicants; and of the first paragraph of § 54-29. In each of these provisions the authority to give examinations and issue certificates relates only to the general heads of these professions, and the language of the final paragraph of § 54-29 enables the Board to break down examinations and certificates so as to apply to any special branch named in the statute.

In view of my opinion with respect to the authority of the Board to make and enforce the rules and regulations in question, I need not discuss the remaining questions raised by you.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Hairdressers—
Formal training—Board may recognize foreign schools.

April 24, 1963

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is in reply to your letter of April 19, 1963, in which you refer to § 54-112.12 of the Code and, especially, to clause B thereof, and present the following question:

"In accordance with the above quoted subsection of § 54-112.12, does the Board of Registered Professional Hairdressers have the authority to promulgate a rule which would permit those persons applying to take its examination to receive formal training in the field of cosmetology or professional hairdressing in schools which are located outside the confines of this State, and which schools have been accredited or approved by the proper authorities of the state in which the schools are physically located?"

Section 54-112.12 is, in part, as follows:

"Upon filing timely application with the Department of Professional and Occupational Registration, upon forms approved by the Commission [Board] and upon payment of an examination fee of fifteen dollars, which fee shall be nonrefundable, any person desiring to qualify for licensing as a 'registered professional hairdresser' shall be permitted
to take such an examination provided that he submits, with his application, evidence satisfactory to the Director of said Department that:

"(5) All persons desiring to be examined and who file applications on or after January one, nineteen hundred sixty-three, shall, in addition to the foregoing, meet one of the following requirements:

"A. Have completed the required course in cosmetology, in a tax-supported school, which course has been approved by the State Department of Education.

"B. Completed the required course in cosmetology, which course has been approved by the State Department of Education at a school approved by the Commission [Board].

"C. Completed an apprenticeship course in accordance with the standards established by the Division of Apprenticeship Training of the State Department of Labor and Industry in a shop approved by the Commission [Board]."

In my opinion the school mentioned in paragraph B does not have to be located in this State. Under this section the course given by the school must meet the approval of the State Department of Education and such school must be approved by the Board appointed under § 54-112.4. The Board, after making adequate investigation of a school in which cosmetology is taught may, if it finds that the school meets the standards required by the Board, approve the same regardless of whether it is located in this State. A requirement that such school has been approved by a comparable Board in the State in which it is located would, of course, be advisable.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Opticians—Advertising.

Honorable Turner N. Burton
Director, Department of Professional and Occupational Registration

May 1, 1963

This will acknowledge receipt of your letter of April 30, 1963, in which you cite § 54-398.23 of the Code of Virginia, relating to advertisements by opticians, as defined in § 54-398.2 of the Code, and present the following question:

"The Virginia State Board of Opticians would like to know if the above section of the Code is applicable to a chain department store which has an optical department located therein and which department is under the supervision of a registered optician, when such store advertises preassembled American Optical sunglasses at a 60% discount in connection with the optical department and includes in the advertisement the following quotation:

"'Services include expert fitting, repair and duplication of lenses and frames. Optical Dept.'

"I am enclosing a copy of the advertisement for your further consideration."

Section 54-398.23 is contained in Chapter 14.1, Title 54 of the Code. Section 54-398.1 relates to exemptions from the provisions of said chapter and provides, in part, as follows:
"Nothing in this chapter shall apply to:
"* * *
"(4) The sale of spectacles, eyeglasses, magnifying glasses, goggles, sunglasses, telescopes, or binoculars, or any of such articles, which are completely preassembled and are sold only as merchandise at permanently located or established places of business."

The advertisement in question is in respect to sunglasses, which you state are preassembled. The copy of the newspaper advertisement which you enclosed purports to be for the sale at a discount of merchandise only. The advertisement does not purport to make repairs and duplication of lenses and frames at a discount. The firm involved has a permanently located or established business at several places in Virginia.

In my opinion, the provisions of Chapter 14.1, Title 54 of the Code, do not apply in this instance.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—Examination—Authority to provide waiting period.

May 2, 1963

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This is to acknowledge receipt of your letter of April 19, 1963, in which you make the following inquiry:

"Does the Virginia Real Estate Commission have the authority to promulgate a rule in accordance with the provisions of Chapter 18, Title 54, Code of Virginia, 1950, which rule would make it mandatory for an applicant for licensure as a real estate broker or salesman to wait for a period of six months to sit for an examination for licensure if the applicant has been unsuccessful in three attempts of passing prior examinations?"

Subsequent to the receipt of this letter you have conferred with representatives of this office in person and tendered a sketch of a rule which the Commission desires to adopt, which is in the following language:

"Each person who is required to prove his competency to transact the business of a real estate broker or salesman in such manner as to safeguard the interest of the public, as set forth in § 54-750, Code of Virginia, by passing a competency test as required above, shall pass such examination within three attempts within a period of six months from the date of filing his application.

"In the event such person does not pass the competency test or examination as required, his application shall be rejected and such person shall not be eligible to sit for any subsequent examination for a period of six months from the date of his last failure. Such person, in order to qualify to sit for any subsequent examination, shall re-submit his application."

Section 54-750 of the Code of Virginia (1950), as amended, sets forth the qualifications for a license which include a determination that the applicant is competent to transact the business of a real estate broker or a real estate salesman. Section 54-751 of said Code requires the filing of an application accompanied by the license fee and the examination fee, which latter fee is not re-
fundable if the applicant fails to appear for the examination. Said section also vests the Commission with power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of said chapter. You state that the Commission has established the policy of giving written examinations during each month of each year except December, and has adopted rules in connection therewith, which rules have been in force for many years. Section 54-750 also provides to what persons licenses shall not be issued, including those whose applications have been rejected within six months prior to the date of the application.

A failure of the examination would necessarily result in the rejection of the application. As the contemplated rule does not require the applicant to wait a period in excess of six months from the date on which he last undertook the examination before being permitted to take the examination again, the same is reasonable, and within the purview of the statute.

I am, therefore, of the opinion that the Virginia Real Estate Commission has authority to adopt the rule set forth above.

PROFESSIONAL AND OCCUPATIONAL REGISTRATION—Real Estate Commission—No authority to expend funds to establish chair for real estate education at University of Virginia.

June 7, 1963

HONORABLE TURNER N. BURTON
Director, Department of Professional and Occupational Registration

This will acknowledge receipt of your letter of June 6, 1963, in which you request my opinion with respect to a proposal submitted to the Virginia Real Estate Commission. The proposal has for its purpose the establishment of a chair for real estate education at the University of Virginia. It is suggested in the proposal that the costs incident to this project should be paid out of the fees collected by the Virginia Real Estate Commission under the provisions of Chapter 18, Title 54 of the Code. It is pointed out by the Virginia Real Estate Commission that the fees are in excess of the expenses incurred in administering the Virginia Real Estate License Law.

In my opinion, there is nothing contained in Chapter 18 of Title 54 of the Code which would authorize the Virginia Real Estate Commission to act favorably upon the proposal made by the Virginia Real Estate Association. Before the Virginia Real Estate Commission may engage in projects of this nature, the General Assembly of Virginia will have to enact legislation authorizing such a project.

Under § 54-747 of the Code, all the fees collected by the Virginia Real Estate Commission are paid into the general fund of the State Treasury. These funds may only be expended pursuant to appropriations. Furthermore, it is also provided in Section 20 of the Appropriation Act of 1962 (Chapter 640, Acts of 1962) that all of the fees collected by the Virginia Real Estate Commission shall be paid into the general fund of the treasury.

The appropriation to the Department of Professional and Occupational Registration is set forth in Item 518 of the Appropriation Act of 1962 and this appropriation is made “for directing and supervising the work of professional and occupational examining and licensing boards.”

In my opinion, the language of this appropriation would not justify the use of any of the funds appropriated to the Department of Professional and Occupational Registration for the purpose contemplated in the proposal.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICERS—Compatibility—Board of supervisors—May not be appointed as parole officer.

BOARDS OF SUPERVISORS—Members—Cannot be appointed as parole officers.

HONORABLE JOEL F. JENKINS
County Judge, County Court of Goochland

June 17, 1963

This is in reply to your letter of June 14, 1963, which reads as follows:

"If possible, I request that you give me an official unofficial opinion on the following question: Can a probation and parole officer appointed according to Code Section 53-244 also hold the position of supervisor in one of the counties in which he works as parole officer?"

Section 15-486 of the Code provides that no person holding the office of a supervisor shall hold any other office, elective or appointive, at the same time. This provision is subject to certain exceptions which do not apply to a member of the board of supervisors. Inasmuch as parole officers appointed under Article I of Chapter 11, Title 53 are, in my opinion, holding an appointive office as contemplated by § 15-486, the member of the board of supervisors cannot hold both offices at the same time.

PUBLIC OFFICERS—Compatibility—Commissioner of Accounts and Registrar—Clerk of county court and registrar.

HONORABLE FRANK NAT WATKINS
Commonwealth's Attorney for Prince Edward County

February 13, 1963

This is in reply to your letter of February 13, 1963, in which you request my opinion as to whether a registrar appointed under § 24-52 of the Code may hold the office of Commissioner of Accounts. In my opinion, the holding of these two offices at the same time is prohibited by §§ 24-52 and 24-53 of the Code of Virginia. Under § 26-10 of the Code an assistant commissioner of accounts "shall perform all the duties and exercise all of the powers required of the commissioner of accounts." In my opinion, an assistant commissioner of accounts is an appointive office.

You also desire my opinion as to whether a clerk of a county court may at the same time hold the office of registrar. A clerk of a county court is an appointive officer and, therefore, would not be entitled to continue to hold the office of clerk in the event he should accept the office of registrar. Sections 24-52 and 24-53 of the Code are also applicable in this instance.
PUBLIC OFFICERS—Compatability—County judge may not serve as tie breaker.

JUDGES—Compatability of Office—May not serve as county tie breaker.

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney for Roanoke County

July 31, 1962

This will acknowledge receipt of your letter of July 26, 1962, in which you refer to the amendment to § 15-240 of the Code (Chapter 595, Acts of 1962) and state, in part, as follows:

" * * * There is no provision in the Code prohibiting a County Judge from being a supervisor, but some question has arisen as to whether or not the County Judge should be construed as an officer of the County. As you know, of course, the County Judge is appointed by the Judge of the Circuit Court, and his compensation is entirely paid by the Commonwealth of Virginia.

"I would appreciate your opinion as to whether or not, in view of the amendment to Code Section 15-240, the County Judge, who is a member of the Bar and a Commissioner in Chancery of the Circuit Court of Roanoke County, is eligible for appointment as tie breaker.

"In this connection, I would also appreciate your opinion as to whether there need be any appointment even though Section 15-240 has been amended, as there is no vacancy in the office of tie breaker under the appointment of June 27, 1958, as the old code section did not designate any term of appointment, and the amended section now provides 'first appointments pursuant to the provisions of this section, as amended, shall be made to fill vacancies existing on or occurring subsequent to the date this section shall take effect,' etc. * * * "

I call attention to § 15-486 of the Code, which prohibits a person from holding more than one county office, subject to the exceptions contained therein. Under this section a county judge is prohibited from holding the office of supervisor while continuing to serve as judge. Inasmuch as a tie breaker acts as a member of the board of supervisors when voting upon a question upon which there is a tie, it would seem that even prior to the amendment of § 15-240, the propriety of a county judge serving as tie breaker was doubtful. The amendment to § 15-240, effective June 29, 1962, expressly provides that "no person shall be appointed or serve as tie breaker who is not qualified to hold office as supervisor or who is an employee of officer of the county."

In some of the counties having a special classification, tie breakers (prior to the amendment of § 15-240) were elected for four year terms, but in counties generally no term was specifically provided. However, it is reasonable to assume that a proper interpretation of the statute would lead to the conclusion that any tie breaker's term of office ran concurrent with that of the Board. Regardless of the provision in the amendment to § 15-240 to the effect that tie breakers appointed or elected prior to June 29, 1962, shall continue in office until the end of their terms, I am of the opinion this must be construed to relate to those holding that office if not disqualified from serving because of other statutory prohibitions.

I am of the opinion, therefore, that a judge of a county court is disqualified from continuing to hold the office of tie breaker, although he may have been appointed to that office prior to June 29, 1962.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICERS—Compatability—Employee of county school board as member of city council.

December 17, 1962

HONORABLE E. W. CHITTUM
Superintendent, Norfolk County Public Schools

This will acknowledge receipt of your letter of December 14, 1962, which reads as follows:

“Our School Board would like to have a statement from your office regarding the following item.

“Could a person employed by our local School Board serve as a member of the City Council? This would involve receiving two salaries and also would place this person in the position of approving appropriations for a school budget of which he was an employee.”

I know of no statute preventing an employee of a county school board from serving on the council of a city. I assume that whenever Norfolk County and the City of South Norfolk are merged into a new city under Chapter 211, Acts of 1962, an employee of the county school board of Norfolk County, who is presently a member of the council of South Norfolk, will, under the charter, continue to serve on the consolidated city council.

I am not aware of any statute preventing an employee of the city school board from serving on the council of the city. Although the city council must make appropriations for the operation of city schools, it nevertheless is the function of the school board to determine the compensation of its employees.

However, the question of public policy may arise as to whether a member of the Council which elects the city school board should continue to be an employee of that board. As I have indicated, I know of no statute that would prohibit such an arrangement. Section 15-393 of the Code is not applicable.

PUBLIC OFFICERS—Compatability—Employee of United States may be Justice of Peace.

April 19, 1963

HONORABLE EDWARD McC. WILLIAMS
Commonwealth’s Attorney of Clarke County

This is in reply to your letter of April 18, 1963, which reads as follows:

“Please be kind enough to advise the undersigned whether or not a regular salaried employee of the United States Post Office Department is, by virtue of his employment by the United States, disqualified from holding the office of Justice of the Peace, either by appointment, or by election.”

An employee of the United States government is prohibited from holding any office under the government of the Commonwealth, or any county city or town thereof, by the provisions of § 2-27 of the Code, unless the position comes within the exceptions set forth in § 2-29. It does not appear that subsection (10) of § 2-29 of the Code would be applicable, inasmuch as the office of justice of the peace of your county would not be an office under the government of any town or city.

It does not appear that this office falls in any of the exceptions contained in Chapter 4, Title 2 of the Code. Therefore, your question is answered in the affirmative.
HONORABLE WALTHER B. FIDLER
Member, House of Delegates

This is in reply to your letter of July 19, 1962, in which you request my advice as to whether Mr. Vaughn H. Drummond, who, I understand, was elected to the Town Council of Colonial Beach at the June 1962 election, is disqualified from holding the office. See §§ 2-27 and 2-29 of the Code of Virginia.

You enclosed a letter dated July 2, 1962 from Mr. R. V. Lowery, Acting Industrial Relations Director of the U. S. Naval Weapons Laboratory, Dahlgren, Virginia, to Mr. George Mason, Jr., Town Attorney of Colonial Beach, which furnishes a description of the work performed by Mr. Drummond for the United States Government at the U. S. Naval Weapons Laboratory, as follows:

"Mr. Drummond is currently employed as a Head (Painter) in the Building Trades and Utilities Branch of the Public Works Department. He serves as a working supervisor of from five to ten Painters and Painter's Helpers employed at several job sites for interior or exterior painting of buildings and ground structures. Approximately 75 per cent of Mr. Drummond's time is spent on his jobs, productively engaged as a Painter while serving as working leader of a group of Painters and Painter's Helpers. The remaining 25 per cent of his time is spent in timekeeping, procuring materials, tools and equipment for his men, etc. The promotion ladder for painters is shown on the enclosure."

Under § 2-27 of the Code, Mr. Drummond, while employed by the United States government, is prevented from holding the office to which he has been elected, unless the disqualification is removed by one of the exemptions contained in § 2-29 of the Code. This section is, in part, as follows:

"Section 2-27 shall not be construed:

" * * *

"To prevent foremen, quartermen, leading men, artisans, clerks or laborers, employed in any navy yard or naval reservation in Virginia, from holding any office under the government of any city, town or county in this Commonwealth; * * * ."

The job description relating to Mr. Drummond's duties seems to bring him within the exception cited above, assuming the naval facilities at Dahlgren may be considered a naval reservation.

If it is a fact that Mr. Drummond's work is performed on a naval reservation, I am of the opinion that he is not disqualified from holding the office of town councilman while performing such duties.
PUBLIC OFFICERS—Compatability—Employees of United States government as town officers.

June 13, 1963

HONORABLE LEDA S. THOMAS
Clerk of Circuit Court of Prince William County

This is in reply to your letter of June 12, 1963, which reads as follows:

"Several persons recently elected in the Town Elections are employed by the Federal Government with classifications above a Government Clerk.

"Before any of these persons are allowed to qualify, I request your opinion as to whether or not I could qualify them under Section 2-27 of the Code of Virginia and Section 2-29, Paragraph 10.

"There are no provisions in the Charter granted by the Legislature in 1962 (page 322) that governs any of the statutes referred to.

"It would be appreciated if you would render a ruling before August 1, 1963."

It would be difficult for this office to render an opinion with respect to the question presented by you without knowing more particularly the type of employment these persons have with the federal government. The question as to the entitlement of persons to office for which they have been elected is one that this office has always been reluctant to determine. It is a question that should be determined by proper proceedings in court.

Specifically, with respect to your duties in connection with the matter, in my opinion, if these persons appear before you for the purpose of qualifying for the offices to which they have been elected and produce the usual certificate of election to which they are entitled under § 24-282 of the Code, you have no alternative in the matter but to permit them to take the oath of office, unless you are prevented by a writ issued by a court of competent jurisdiction.

PUBLIC OFFICERS—Compatability—Justice of Peace as clerk in local post office.

April 9, 1963

HONORABLE B. H. HICKS, Sr.
Justice of the Peace, Petersburg, Virginia

This will acknowledge receipt of your letter of April 1, 1963, in which you request my opinion "as to whether [you] can continue [your] duties as a Justice of the Peace in the City of Petersburg while in the postal service, and not be in violation of any Commonwealth of Virginia laws."

Subsequently, we have received information that you are employed by the Post Office Department as a clerk.

The prohibitions contained in § 2-27 of the Code with respect to holding office are subject to the exceptions contained in § 2-29. Subsection (1) of this section of the Code provides that § 2-27 shall not be construed—

"(10) to prevent any United States government clerk from holding any office under the government of any town or city; or from being appointed as special policemen for a county by the circuit court or judge thereof as provided for in § 15-562;"

By reference to the Charter of the City of Petersburg (Chapter 265, Acts of Assembly, 1956), I find that Chapter 6 of the Charter provides for the election of sixteen justices of the peace. This provision has been in the Charter since the
1874-75 session of the General Assembly. It is clear, therefore, that a justice of
the peace in the City of Petersburg holds an office "under the government of a
city."

In my opinion, subsection (10) of § 2-29 of the Code is applicable to a justice
of the peace for the City of Petersburg, and that employment as a clerk in the
local post office does not deprive one from holding the office of justice of the peace
in that city.

PUBLIC OFFICERS—Compatability—Member of Council of City of Ports-
mouth and Tidewater Airport Commission.

HONORABLE WILLIAM B. S P O N G, JR.
Member, Virginia State Senate

September 10, 1962

This will acknowledge receipt of your letter of September 7, 1962, in which you
request my advice as to whether or not a member of the council of the City
of Portsmouth is eligible to serve, by election of the council, as a member of the
Tidewater Airport Commission, a political subdivision, created by Chapter 606 of
the Acts of the General Assembly of 1962. This Act provides that the term "Com-
mission" as used therein, "shall mean Tidewater Airport Commission established
under the provisions of Article 2, Chapter 3, Title 5 of the Code of Virginia, by
joint action of the counties of Southampton, Norfolk, Princess Anne, Isle of
Wight and Nansemond, and the cities of Franklin, Suffolk, Virginia Beach, South
Norfolk and Portsmouth, and the town of Smithfield." The Act further states that
"the exercise of the powers and duties conferred upon the Commission by the
said counties, cities and town by their respective ordinances * * * shall be
deemed and held to be for the public use and in the performance of an essential
government function."

The powers and duties of the Commission will be such as are prescribed by
the participating governmental units under the provisions of the statutes appear-
ing in Title 5 of the Code and cited in the Act, and the further powers conferred
in Section 3 of the Act.

The courts have been reluctant to define the term "public office" in a manner
which will meet every situation.

Generally, a public officer holds a position to which he is required by law
to be elected or appointed, who has a designation or title given him by law and
who exercises functions concerning the public, assigned to him by law. See 42
American Jurisprudence, "Public Officers" page 880. It is not necessary that
the position of trust shall have a fixed tenure nor is it necessary for a compensa-
tion to be attached to the position.

In my opinion, the members of the Commission hold office within the meaning
of that term as used in the following provision of the City Charter:

"No member of the council shall be eligible, during his tenure of
office as such member, or for one year thereafter, to any office to be
filled by the council, by election or by appointment." Acts of Assembly
of 1908, Chap. 157, Sec. 19.

This section of the City Charter alone, without regard to other provisions of
law, in my opinion, would prevent a member of the council of the City of
Portsmouth from serving as a member of the Tidewater Airport Commission
under an election as such by the council of which he is a member.
PUBLIC OFFICERS—Compatability—Member of welfare board may serve on county reassessment board.

HONORABLE EDGAR T. REEVES, JR.
Commonwealth’s Attorney for Mathews County

This is in reply to your letter of October 8, 1962, which reads, in part, as follows:

“Mathews County is having a general reassessment of real estate in the year 1962 and one member of the Reassessment Board is an employee of the State Forester and is also a member of the Mathews County Welfare Board. It has been brought to my attention that a ruling from your office prohibits a state employee from serving on a County Reassessment Board.”

You request my advice as to whether or not this person is prohibited from serving on the Reassessment Board.

We have no specific rulings with respect to an identical situation. However, there is no statute which would prevent an employee of the State Forestry Service from serving on such Board.

Members of the Welfare Board of the County are deemed to be officers and a member of the Board of Assessors is also an officer. It does not appear, however, that § 15-486 of the Code, which prevents certain county officers from holding other offices, would be applicable in this case.

Therefore, in my opinion, the member of the Welfare Board is not prohibited by statute from serving as a member of the Board of Assessors.

PUBLIC OFFICERS—Contracts—City Council—Members may not contract with school board for insurance coverage.

SCHOOLS—School Boards—May not place insurance coverage with member of City Council.

HONORABLE ALFRED H. GRIFFITH
Commonwealth’s Attorney for City of Buena Vista

This is in reply to your letter of October 18, 1962, which reads, in part, as follows:

“The School Board proposes to convert all of its fire insurance to the Public and Institutional Property Form (PIP) and will designate one of the local agencies as the Agent of Record. The Agent of Record will then be instructed by the School Board to place the fire insurance among the four local agencies, including that of the Agent of Record, the proportion to be awarded each agency to be determined by the School Board. One of the local agents is a member of the City Council (not the one who is to be named the Agent of Record) and these questions have arisen.

1. Is it illegal to award a portion of the fire insurance in the manner indicated above to an agent who is a member of the City Council?

2. If this is done, would the fire insurance be void or would the issuing company still be liable?
"3. If No. 1 is illegal, would it be illegal to award a portion of the fire insurance to the company represented by the agent who is a member of council, without going through his agency at all, the insurance being placed directly with the company by the Agent of Record?

In reply to your question No. 1, in my opinion, it would be a violation of § 15-508 of the Code. A member of the City Council under this section is prohibited during the term for which he is elected from being a contractor or subcontractor with the city. This code section further provides that a member of the Council may not be interested, directly or indirectly, in any contract or subcontract or the profits therefrom during his term of office, nor as agent for such contractor.

With respect to your second question, it is expressly provided in this section that: "Every such contract or subcontract shall be void, and the officer, councilman, agent, or member of such committee making such contract shall forfeit to the Commonwealth the full amount stipulated for thereby." The term "contract," as used herein, refers to the contract for the payment of the premium in this instance, rather than the insurance policy. The underwriter would not be relieved from payment of a valid loss under the terms of the policy.

The second paragraph of § 15-508 also applies and reads as follows:

"No officer of a city or town, who alone or with others is charged with the duty of auditing, settling or providing, by levy or otherwise, for the payment of claims against such city or town, shall, by contract, directly or indirectly, become the owner of or interested in any claim against such city or town. Every such contract or subcontract shall be void, and if any such claim be paid, the amount paid, with interest, may be recovered back by the city or town, within two years after payment, by action or motion in the circuit or corporation court having jurisdiction over such city or town." (Italics supplied.)

A member of the City Council, of course, participates in the laying of a levy or otherwise authorizing the payment of a claim for an insurance premium against such city. The contract, therefore, for the payment of the premium in which this councilman would be interested would, of course, be void and if the premium is paid, the amount so paid, with interest, may be recovered.

I do not construe this section to mean that the contract of insurance with the underwriter would be void.

With respect to question No. 3, if the agency in which the Council member is interested receives any portion of the premium or otherwise benefits by the placing of the insurance direct with the insurance company, such a transaction is prohibited by § 15-508 of the Code.

______________________________

PUBLIC OFFICERS—Contracts—Member of board of supervisors cannot share in proceeds from insurance contracts.

March 7, 1963

HONORABLE J. VAUGHAN BEALE
Commonwealth's Attorney of Southampton County

This will acknowledge your letter of March 6, 1963, in which you request my opinion as to whether or not a person may serve as a member of the board of supervisors and continue to participate in the commissions from insurance premiums paid by the county and the county school board, such person having an interest in one of the participating insurance agencies. You have enclosed copy of a letter
to you from the person who is considering offering himself as a candidate for the board of supervisors, which letter contains the following observations:

“The insurance for the County of Southampton and the Southampton County School Board is written, handled, serviced, and collected for by a designated Broker of Record which receives a percentage of the commissions. The balance of the commissions which are left are then distributed among several approved insurance brokers in the County. The Broker of Record participates in this distribution also. This is a share and share alike proposition with the exception that the Broker of Record receives a certain percentage of the commissions before distribution is made as referred to above. The distribution of commissions is made from the Broker of Record funds.

“You and the Attorney General will of course bear in mind that these rates are regulated premiums and I do not have any control whatsoever over prices. I do not have any agreement or contract with the County or the School Board. My agreement is with the other insurance brokers in the County. As you can see under these circumstances, there is no negotiation or could there be any manipulation under this arrangement. As a matter of fact, the Broker of Record merely agrees to making the distribution of the insurance commissions for the consideration of having the business assigned to his office for placing with his companies.”

It is my understanding that Southampton County has not adopted one of the forms of government provided in Chapters 11 and 12 of Title 15 of the Code and, therefore, § 15-504 of the Code is applicable. In this connection, I enclose copy of an opinion dated November 25, 1959, to Mr. Leonard Jones, and published in the Report of the Attorney General (1959-1960), p. 30, which, apparently, is applicable to the question presented. In my opinion the method for handling this insurance as set forth in the quotations from the letter enclosed by you has no effect upon the statutory prohibition against a member of the board of supervisors having an interest, directly or indirectly, in the writing of insurance upon county property. In my opinion, if the person in question is elected and qualifies as a member of the board of supervisors, he would have to disassociate himself from the insurance firm which is currently writing this insurance, if that firm is to continue writing such insurance.

I also enclose copy of an opinion written to the Commonwealth’s Attorney of Nelson County, published in the Report of the Attorney General (1959-1960), p. 15, which relates to counties which have adopted one of the forms of government set forth in Chapters 11 and 12 of Title 15.

PUBLIC OFFICERS—Contracts—Member of board of supervisors furnishing supplies to county.

BOARDS OF SUPERVISORS—Motions—Majority vote necessary.

HONORABLE JULIUS C. DUNNAVANT
Member, Board of Supervisors of Charlotte County

This is in reply to your letter of April 9, 1963, in which you state that the Auditor of Public Accounts recently filed a report with the board of supervisors
of the county in which he called attention to an apparent violation of § 15-504 of the Code, due to the fact that a member of the board of supervisors is alleged to have furnished certain supplies to the county for the jail, he being the owner of the firm that furnished these supplies.

You state that at a meeting held on April 8, 1963, you (1) made a motion that the report of the Auditor of Public Accounts be made a part of the minutes and, (2) offered the following resolution:

"BE IT RESOLVED, that, pursuant to Section 15-504 of the Code of Virginia for 1950, as amended, the Commonwealth's Attorney be, and he is hereby authorized and directed to request J. R. Canada, trading as Canada's Store, to refund to the Treasurer of Charlotte County, Virginia, the sum of $129.58 within ten (10) days from this date; and,

"BE IT FURTHER RESOLVED, that, should said funds not be repaid to the Treasurer of Charlotte County within said period of ten (10) days, the Commonwealth's Attorney be, and he is hereby directed to institute suit on behalf of the County against J. R. Canada, trading as Canada's Store for the purpose of collecting, and that he collect on behalf of said County, the said sum of $129.58, using whatever legal action may be required.

"BE IT FURTHER RESOLVED, that, the Commonwealth's Attorney be and he is hereby directed and requested, to ascertain whether any such further transactions of this nature have taken place, and should such be found, to take the proper action to recover such expenditures."

There was no second to either of your motions and no vote was taken on either motion.

You present two questions as follows:

"I would like to know if I am entitled to have these two motions recorded in the minutes of the meeting, even though they were not seconded at my request.

"Under Section 15-504, as listed in the report from the State Auditor of June 30, 1962, does it take a majority to put this section into effect, or can this be accomplished by a single member of the board?"

With respect to your first question, I am enclosing copies of four opinions of this office as follows:


I feel sure these opinions will furnish the answer to your first question.

With respect to your second question, I think it, too, is answered in the enclosed opinions.

A majority of the members of the board voting on the question would be necessary for a motion to recover the money to prevail.
PUBLIC OFFICERS—Contracts—School board not to purchase supplies from firm in which Commonwealth's Attorney is interested.

SCHOOLS—School Boards—Not to purchase supplies from Commonwealth's Attorney.

Dr. Woodrow W. Wilkerson
Superintendent of Public Instruction

March 7, 1963

This will acknowledge receipt of your letter of March 6, 1963, in which you state that you have been requested by the Page County School Board to obtain an opinion from this office as to whether or not it is a violation of §§ 15-504 and 22-213 for the School Board of Page County to purchase fuel oil from a firm in which the Commonwealth's Attorney of the county has a financial interest. It is stated that the school board lets the contract for the purchase of gasoline, motor oil and heating fuel after advertising the same and that the contract is always awarded to the low bidder. It is further stated that the Commonwealth's Attorney of Page County does not serve as the school board attorney and in no way acts as counsel or adviser to the board. Section 15-504 of the Code is applicable. It does not appear that § 22-213 of the Code applies.

Section 15-504 expressly provides that no "... attorney for the Commonwealth * * * shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by * * * the county school board ...". I see no escape from the conclusion that § 15-504 of the Code prohibits a school board from purchasing gasoline or other petroleum supplies from a firm in which the Commonwealth's Attorney has an interest. Neither the fact that the Commonwealth's Attorney does not serve as attorney for the school board, nor the fact that the supplies are purchased from the lowest bidder takes the transaction out of the prohibitions of this Code section.

PUBLIC OFFICERS—Contracts—School Trustee Electoral Board—Member cannot have interest in contracts of insurance on county-owned buildings.

SCHOOLS—Trustee Electoral Board—Members may not contract with county for insurance coverage.

Honorable James B. Fugate
Member, House of Delegates

October 19, 1962

This is in reply to your letter of October 18, 1962, in which you inquire as follows:

"Mr. A. is a salaried employee of a local insurance agency which sells and writes some of the fire insurance on the school buildings in the County. In view of the provisions of Section 22-213 of the Code of Virginia, would Mr. A. be in violation of these provisions by accepting appointment on the County School Trustee Electoral Board?"

Mr. A., in my opinion, would not be in violation of §§ 22-213 or 15-504 of the Code of Virginia, provided he does not sell or solicit insurance on any county-owned building, or have any direct or indirect interest in the premiums paid, or the profits of the agency, while serving as a member of the School Trustee Electoral Board. This office has previously held that a member of this Board is a school officer.

As I understand this situation, if Mr. A. accepts the appointment on the County School Trustee Electoral Board, he will not be interested, directly or
indirectly, in any insurance that might be placed by the agency by which he is employed with the School Board or any other Department of the county. Under these circumstances, §§ 22-213 and 15-504 would not apply.


PUBLIC OFFICERS—Contracts—Secretary of Electoral Board—Insurance contracts with county.

COUNTIES—Contracts—May contract for insurance with company having employee as member of electoral board.

HONORABLE R. H. L. CHICHESTER
Commonwealth's Attorney of Stafford County

December 14, 1962

This is in reply to your letter of December 12, 1962, which reads as follows:

"I would like your opinion on the following question: An employee of an insurance firm is secretary of the Electoral Board of Stafford County and as such draws compensation appropriated by the County. The question is, under Section 15-381, is the secretary of the Electoral Board, an employee of an insurance agency, prohibited from selling insurance to Stafford County?"

Section 15-504 is applicable. Section 15-381 applies only to counties having a county board form of government, and it is my belief that your county has not adopted this form of government.

Unless the insurance is sold to the county under conditions by which the Secretary of the Electoral Board would receive a part of the premium, I am of the opinion the insurance agency may sell insurance to the county. It is my understanding that the agent who is a member of the electoral board is employed on a salary and that his compensation would not be affected by the transaction.

Since the agent would not profit by the contract made by his employer with the county, he would not have any interest directly or indirectly in the transaction and, therefore, § 15-504 would not apply.

PUBLIC OFFICERS—Police—No duty to respond to all ambulance calls.

HONORABLE JOHN A. K. DONOVAN
Member of State Senate

February 26, 1963

This is in reply to your letter of February 14, 1963, in which you request my opinion as to whether it is a proper function of a police officer to answer all ambulance calls, including those in which patients are being transferred from their homes or doctors' offices to hospitals. You advised that such a practice has developed in the Town of Vienna and is causing some consternation in the medical profession, due to the fact that the police officers interrogate all persons present at the scene.

In the absence of information or evidence which would tend to indicate the commission of a crime, I should think that no proper police function would be served in answering calls for ambulance service.
This will acknowledge receipt of your letter of January 18, 1963, which reads as follows:

"I would like to have your opinion on the following question: I now live outside of the City Limits of South Boston, but it seems that my home will be annexed by the City of South Boston, and I would like to know whether or not I will be required to move my residence if I am annexed.

"South Boston is a second class city, therefore, all the civil work for the City of South Boston is my responsibility. Also, the criminal work; however, it is carried out to a great extent by the South Boston Police Department. The City will still use our court facilities for felony cases and also our jail.

"I am of the opinion, from the law, that as long as I perform a duty in this City, that I am not required to move out. However, I would like to have your opinion on the above question."

Under the provisions of § 15-94 of the Code, when the town of South Boston became a city of the second class, the sheriff of Halifax County continued to exercise the powers of sheriff in the city to the same extent as was the case before the transition of the town into a city of the second class.

Under this same section of the Code, the qualified voters residing in the City of South Boston shall be eligible to vote for the sheriff of Halifax County.

Under the provisions of § 15-152.23 of the Code, which is a part of Chapter 8 of Title 15, relating to annexation, it is provided as follows:

"If a county or district officer resides in territory annexed to a city such officer may continue in office until the end of the term for which he was elected or appointed . . ."

It will be observed that under this section, it is specifically provided that a county officer brought into a city by annexation does not lose his office, but may continue in such office until the end of the term for which he was elected or appointed.

Under § 15-487 of the Code, a sheriff shall at the time of his election, have resided in the county for six months next preceding his election. A person who resides in a city of the second class would not be eligible to be elected as sheriff of the county, since he is not a resident of the county.

Generally, when annexation is made it becomes effective on the first of January of the succeeding year and, in all probability, you will be a resident of Halifax County when the November election of 1963 occurs. If that is true, and the annexation subsequently takes place during your term of office, under § 15-152.23 you could continue to hold the office until the end of the term. Your new term would begin simultaneously with the date of the annexation and this might raise some doubt as to the applicability of the above section of the Code. However, I believe that under the language of the first sentence of § 15-152.23 you could serve the term for which you were elected in November, 1963, even though you should continue to reside in the city.
PUBLIC OFFICERS—Residence—Member of board of supervisors must reside in magisterial district.

BOARDS OF SUPERVISORS—Members—Must reside in magisterial district.

December 17, 1962

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

This is in reply to your letter of December 15, 1963, which reads as follows:

"Upon the request of one of my constituents, I wish to obtain your opinion on the following questions:

1. May a member of a County Board of Supervisors represent one precinct while living in another precinct other than the one he is elected to represent.

2. May a Board of Supervisors employ special legal counsel other than at a regular or special meeting and without a vote duly recorded in the minutes.

3. May a licensed attorney who is also a United States Commissioner or a United States Deputy Commissioner be employed as special counsel and legal advisor to a County Board of Supervisors."

(1) A member of a board of supervisors represents a magisterial district, and I assume that you intended to use the word "district" rather than "precinct." Sections 15-487 and 15-488 are applicable. You will note that under § 15-488, removal from the district vacates the office. However, whether or not the office has been vacated depends upon other facts which are not disclosed in your letter.

In this connection, you are referred to the leading cases in Virginia on this question, namely, Williams v. Commonwealth, 116 Va. 272 and Dotson v. Commonwealth, 192 Va. 565. By examination of these cases you will observe that a determination of the question would probably turn upon the intention of the supervisor in question.

I regret that I cannot give you a positive answer, but I believe after you have read these cases you will be in position to resolve the matter.

(2) Any official action by a board of supervisors must, of course, take place either at a regular meeting or a special meeting. Compliance with §§ 15-242 and 15-243 would be required in case of a special meeting.

(3) I can see no objection to employment of this nature. Since a special counsel or legal advisor is not an office, § 2-29 of the Code would not apply.

I assume that your question was presented due to the connection with the United States Department of Justice of the person retained by the county for special legal services. Section 15-9 authorizes counties to employ special counsel under the circumstances therein set forth.
PUBLIC OFFICERS—Salaries—No authority in governing body to fix salaries of deputies of Commissioner of the Revenue and Treasurer.

HONORABLE GEORGE D. FISCHER  
Commissioner of the Revenue  
HONORABLE COLIN C. MACPHERSON  
Treasurer of Arlington County

October 9, 1962

This is in reply to your joint letter of September 25, 1962, in which you direct attention to § 14-8.1 of the Code of Virginia, enacted by Chapter 55, Acts of the General Assembly of 1962. This section reads as follows:

"Notwithstanding any other provisions of this title, the governing body of any county having a population of more than four thousand per square mile may, in its discretion, supplement the compensation of the treasurer, clerk, commissioner of the revenue, attorney for the Commonwealth and sheriff of such county, or any of their employees, above the salary of any such officer or employee established in this title, in such amounts, as it may deem expedient. Such additional compensation shall be wholly payable from the funds of any such county and shall not exceed one-half of the amount of participation by the State in the amount of the salary of the officer or employee."

Under the population classification, this statute is applicable to Arlington County.

You state as follows:

"The Arlington County Board on September 11, 1962, undertook to implement the above section by authorizing some salary increases to most of the employees in the offices of the Commissioner of the Revenue and the Treasurer, which increases place the salaries in excess of allowances granted by the State Compensation Board for the current year. However, as a condition precedent to granting such increases, the Commissioner of the Revenue and the Treasurer would be required to secure all new employees from the eligible register in the County Personnel Department.

"Although the salary increases that have been authorized are not sufficient to place employees in these offices where they might rightfully belong on the basis of longevity in the Pay Plan currently in operation for employees under the Merit System Ordinance of the County Government, the allowances followed a job classification study that was conducted by agencies of the County Board. Accordingly, a corollary to the requirement that all new employees be secured from eligible lists of the Department of Personnel is the right of the County Board through its representatives to classify according to County grading standards the positions in these constitutional offices.

"A discussion with Mr. William L. Winston, who sponsored the aforesaid House Bill No. 39 has disclosed that there was never any intention of the legislature that provisos or conditions be inserted into any attempted implementation of this legislation which might interfere with the internal affairs of the constitutional office involved.

"Under present law, the Commissioner of the Revenue and the Treasurer, being elected by popular vote, are responsible to the citizens of Arlington County for the administration of their offices, including the hiring of their employees and the termination of such employees' services. The office of the Commissioner of the Revenue and the office of the Treasurer are both bonded, as required by the Code of Virginia, thus requiring the exercise of a very high degree
of judgment in the employment of persons and also requiring of the employee a sense of personal loyalty to the officer involved.

"It is submitted that it is the plain import of Section 110 of the Constitution of Virginia and pertinent sections of the Code of Virginia, as amended, dealing with the appointment of deputies, that the management of the internal affairs of the Constitutional offices rests solely with the officer involved and that such offices are intended to be autonomous and responsive to the electorate rather than subservient to the wishes and direction of the County Board either directly or indirectly."

You have presented for my consideration the following questions:

"(1). Under the above-quoted Section 14-8.1, does the Arlington County Board have the authority to designate the name of an employee in the office of the Commissioner of the Revenue or the Treasurer and specify the amount of supplementation to the salary such employee shall receive?

"(2). Does the Arlington County Board have authority, after a supplement has been granted to an employee of the offices mentioned above, to rescind such supplement?

"(3). Does the proviso of the resolution of the Arlington County Board requiring the Commissioner of the Revenue and the Treasurer to employ only applicants from eligible lists of the County Department of Personnel, the Director of which is a County government appointee, amount to such interference with, or impairment of the constitutional officers management of the internal affairs of his office as to be violative of Section 110 of the Constitution of Virginia or the Code of Virginia, as amended?

"(4). If the Arlington County Board has the authority to require the Commissioner of the Revenue and the Treasurer to secure all future employees from the County Merit System eligible list and said officers acquiesce in this requirement, would employees when hired in this manner be bound by the Merit System ban on political campaign participation?

"(5). If the incumbent Commissioner of the Revenue and the Treasurer accept the implementation of salaries of their employees by the County Board by agreeing to the condition imposed that all new employees in their offices be recruited solely from eligible lists of the Department of Personnel, would this action be binding on their successors in office?

"(6). For the purpose of determining salary increments, does the Arlington County Board have authority to make a classification and job description, through its personnel office, of a constitutional office employee to fit within the scope of the classification of general county employees?"

I am informed that Arlington County has adopted the County Manager Plan permitted under the provisions of Article 3, Chapter 12 of Title 15 of the Code (§§ 15-350 through 15-355.1 of the Code).

With respect to question (1), I am of the opinion that the Treasurer and the Commissioner of the Revenue have the sole power to select and appoint their deputies and other personnel of their respective offices. Section 15-350.1 of the Code expressly forbids the County Board from exercising an appointing power, except as to those persons appointed by the Board. Furthermore, under § 15-485 of the Code, the Commissioner of the Revenue and the Treasurer of a county are expressly given the power to appoint their respective deputies. Section 15-352 of the Code gives the County Manager the appointing power of all officers and employees whose appointment or election is not otherwise pro-
vided by law. The Commissioner of the Revenue and the Treasurer, being officers elected by and directly responsible to the people, are not subject to supervision of the County Board nor the County Manager in the determination of who shall be employed in their respective offices.

With respect to the latter part of question (1), whether or not the Board shall appropriate funds to provide supplemental compensation is entirely within its discretion. Therefore, the Board may make appropriations under this section upon such conditions as it may prescribe.

Question (2) is answered in the negative. Under § 58-839 of the Code, however, the Board may make appropriations on a monthly, or other basis. If the appropriation to your offices are for a limited period, the failure to make an appropriation at the end of such period would have the same effect as a rescission.

With respect to question (3), the answer is in the affirmative. The sole responsibility in regard to the selection, qualification and employment of personnel is vested in the officer in charge. This responsibility may not be abrogated.

In view of the answers to the preceding questions, I do not deem it necessary to reply to question (4).

Questions (5) and (6) are answered in the negative.

PUBLIC OFFICERS—Terms of Office—Vacancies. April 9, 1963

HONORABLE H. A. STREET
Town Attorney, Town of Grundy

This is in reply to your letter of March 28, 1963, with which you enclosed a copy of a resolution adopted by the Town Council requesting my opinion relating to the terms of office for two members of the Town Council who were appointed to fill vacancies created by resignation of two members of the Council.

In the absence of a special statute or a charter provision on the subject, the manner in which vacancies are filled for the office of town council is governed by § 15-423, Code of Virginia (1950). That section reads as follows:

"The council of a town shall judge of the election, qualification, and returns of its members, may fine them for disorderly behavior and, with the concurrence of two-thirds, expel a member. If any person returned be adjudged disqualified or be expelled, a new election to fill the vacancy shall be held at the same place, on such day as the council may prescribe, except that when there shall be vacancies in the majority of the council the circuit court or the judge thereof in vacation, shall fill such vacancies. Any vacancy occurring otherwise during the term for which any of such persons have been elected may be filled by the council from the electors of the town. A vacancy in the office of mayor may be filled by the council from the electors of the town." (Italics supplied)

It is generally recognized that any officer appointed or elected to fill a vacancy serves for the unexpired term of office unless the Legislature provides for a shorter tenure. For example, see § 15-392 of the Code, which applies to elective officers of cities and towns other than the governing body. In the instant case, I am of the opinion that the two members of Council who were appointed by the remaining members of Council to fill the vacancies created by resignation will hold office for the unexpired term of the officers they were designated to replace.
RECORDATION—Copies—Questionable as to right to record.

April 5, 1963

HONORABLE J. PHIL BENNINGTON
Clerk, Circuit Court of Grayson County

This is in reply to your letter of March 8, 1963, in which you request my opinion as to whether it is proper to record a copy of a lease agreement when the entire instrument, including the signature, is a copy of the original.

Generally speaking, any signed instrument which is duly acknowledged may be admitted to record by the clerk. While I am aware of no statutory provision which would preclude the recordation of a duplicate or copy of the originally executed instrument, I feel that any copy so offered should have an original signature thereon. Accordingly, I am of the opinion that an instrument, the entire contents of which is a copy, should not be admitted to record.

RECORDATION—Judgment Lien Docket—When clerk to record.

WELFARE—Liens Against Property—When clerk to record.

May 27, 1963

HONORABLE THOMAS P. CHAPMAN, JR.
Clerk of Circuit Court of Fairfax County

This will acknowledge receipt of your letter of May 24, 1963, enclosing copy of a “Public Notice of Indebtedness Against Property” issued by the District of Columbia Department of Public Welfare which they wish to docket among your judgment lien dockets in the same manner as the local welfare claims. You raise the question as to whether or not a foreign jurisdiction has the same privileges as the local Department of Public Welfare. You state that the District of Columbia agency has cited §§ 63-127 and 63-191 of the Code of Virginia as to authority for docketing the instrument.

In my opinion, the document which has been submitted to you for recordation should be recorded, inasmuch as it substantially meets the requirements of § 55-106 of the Code. However, it would not be treated as a document filed under § 63-127, but would be spread upon the deed book in its entirety and indexed in the name of Kate Harper, Grantor, and District of Columbia Department of Public Welfare, Grantee. The recording fee, in my judgment, would be governed by § 58-58 of the Code.

The duties of a clerk in this connection are purely ministerial. Whether or not the document is sufficient to create a lien upon the real estate is a matter that would be an issue between the Welfare Board of the District of Columbia and the property owners.

I am returning herewith the paper which was submitted to you for recordation.

SCHOOLS—Appropriations—School board must present estimate of contemplated expenditures.

January 31, 1963

HONORABLE VICTOR R. GILLY
Superintendent of Bland County Schools

This is in reply to your letter of January 29, 1963, in which you set forth the difference of opinion existing between yourself and the Board of Supervisors
concerning the preparation of the monthly appropriation for school operations. Chapter 18, Title 15, Code of Virginia, 1950, as amended, was the subject of a comprehensive discussion by my predecessor in office under date of June 3, 1960, addressed to the Honorable C. Harrison Mann, Jr., Member of the House of Delegates. A copy of that letter is enclosed herewith and may be found in the Report of the Attorney General (1959-1960), pp. 66-71. You will note that the Attorney General at that time emphasized the language "contemplated expenditures" wherever it appeared in that opinion. It was the view of the then Attorney General, a view in which I concur, that the legislation adopted in 1959 requires a budget of contemplated expenditures, whether the moneys be appropriated on an annual basis, or semi-annually, quarterly or monthly.

In view of the fact that the Board of Supervisors of Bland County has chosen the monthly appropriation system of financing, I think it quite manifest that an estimate of contemplated expenditures should be presented by the School Board a month in advance of the time such expenditures are to be made. Thereafter, the Board of Supervisors should appropriate the necessary funds to meet that budget, if it be so advised, in order that the funds will be available at the time the obligation is incurred by the School Board.

SCHOOLS—Bonds—County Bonds—When referendum necessary.

HONORABLE E. B. STANLEY
Division Superintendent, Washington County Schools

January 29, 1963

This will acknowledge the receipt of your letter of January 28, 1963, which reads as follows:

"On March 20, 1962, the voters of the Holston Magisterial District of Washington County approved the issuance of $700,000 in bonds to build a new high school building in that district. Since the election was held, it appears that a more favorable rate of interest could be obtained on the bonds when they are sold if they were county-wide bonds rather than magisterial district bonds. My question, then, is this: Could the Washington County School Board and the Board of Supervisors by proper resolutions authorize the issuance of county-wide bonds rather than the magisterial district bonds as approved by the voters of Holston District and place the necessary levies on the taxable property in the Holston District to retire the bonds as they come due? I would appreciate it if you would let me have your opinion in this matter so I can pass it on to the School Board next Monday."

The only way these bonds could be made county-wide—that is, backed by the taxing power of the County—would be to proceed under Article 3, Chapter 19.1 of Title 15 of the Code, to have a county-wide referendum. The Board of Supervisors and the School Board cannot, by resolution, extend the district bonds to the status of county bonds.

I assume the bonds in question were issued pursuant to the provisions of § 15-666.32:1 of the Code and, as a consequence, although the Board of Supervisors will execute the bonds, they are nevertheless district bonds only. I fail to see where investors would consider these bonds more attractive should the resolution suggested by you be adopted by the School Board and the Board of Supervisors.
SCHOOLS—Bonds—County Obligation—When referendum necessary.

January 31, 1963

HONORABLE E. B. STANLEY
Superintendent, Washington County Public Schools

This is in reply to your letter of January 30, 1963, in which you present the following question:

"The School Board, in addition to planning the new high school building in Holston District, is planning to build an elementary school in the Abingdon Magisterial District and one in the Goodson Magisterial District, and my question is: Could the Washington County School Board and the Board of Supervisors, by proper resolutions, abandon the plans to sell the $700,000 of Holston Magisterial District bonds under Code Section 15-666.32:1 (the Code Section under which we have proceeded thus far) and issue county-wide bonds for the Holston District high school and the elementary schools in Abingdon and Goodson Districts without an election, and place levies on the taxable property in each of these districts to retire its proportionate share of the bonds as they become due and payable?"

The answer to your question is in the negative. The school board and the board of supervisors do not have authority to create an obligation against the county for the construction of schools (except for Literary Fund loans) unless the obligation is approved by referendum of the voters of the county. The proposal suggested by you would be contrary to the provisions of Section 115a of the Constitution.

SCHOOLS—Bonds—No authority for board of supervisors to hold advisory referendum.

BOARDS OF SUPERVISORS—No authority to hold advisory referendum.

October 1, 1962

HONORABLE HORACE T. MORRISON
Commonwealth’s Attorney for King George County

This is in reply to your letter of September 28, 1962, which reads as follows:

"Our School Board has proposed to the Board of Supervisors that a new elementary school be constructed at a cost of about $350,000.00, the money to be obtained from the Literary Fund.

"The Board of Supervisors wishes to know whether a referendum may be legally called to see whether a majority of the voters favor such construction. No bond issue will be involved. If such referendum be called, can it be at the same time as the general election. If not, could such referendum be called to be on the same date as a special election to determine whether the county is to have an A.B.C. store."

There is no provision in the Code authorizing a referendum of the nature suggested in your letter. However, if the board of supervisors wishes to ascertain the feeling of the voters with respect to such a matter, I can see no reason why this could not be done, either at the general election or at a special election to be held with respect to an A.B.C. store."
Such a referendum, of course, would not be binding upon the board of supervisors, nor would it have any effect upon the security behind any Literary Fund loan.

SCHOOLS—Bus Drivers—Age—Must be between sixteen and sixty-five at time of contract.

Honorable E. R. Hubbard  
Justice of the Peace for Wise County  

This is in reply to your letter of July 10, 1962, in which you request my advise as to whether or not a person over 65 years of age, but in good physical health, can be employed to drive a school bus.  

Section 22-276.1 of the Code of Virginia, relating to the requirements of a person employed to drive a school bus, is, in part, as follows:

"No school board or superintendent of schools of any county or city shall hire, employ, or enter into any agreement with any person for the purposes of operating a school bus transporting pupils after July first, nineteen hundred and sixty-two, unless the person proposed to so operate such school bus shall:

"(e) Be between the ages of sixteen and sixty-five years, both inclusive, at the time of signing such contract."

You will note that under this provision no person may be employed who is not between the ages of sixteen and sixty-five, both inclusive, at the time of the signing of the contract.  

This provision became effective July 1, 1962 and is applicable to any contract for such service signed on or subsequent to that date.

SCHOOLS—Compulsory Attendance—"Neglected child" provision not applicable unless locality adopts attendance law.

Honorable Charles G. Stone  
Commonwealth's Attorney of Fauquier County  

This is in reply to your letter of June 25, 1963, which reads as follows:

"I have just read with interest your opinion on page 3 of the June issue of the Virginia Bar News, relative to the compulsory attendance law which has been adopted in Nelson County.

"Various counties, including Fauquier have not adopted this law. My question is, whether in those counties a child who does not go to school may be proceeded against in Court as a 'neglected child' as provided in Sections 16.1-158; 22-275.11; 22-275.20; or any other statutes."

The provisions of Article 4, Chapter 12 of Title 22, relating to compulsory school attendance of children in the public schools, are not effective in those counties which have not complied with § 22-275.24 of the Code. Therefore, since your county has not put into effect the compulsory school attendance statutes, a child is not deemed "neglected" under § 22-275.20.
It is my opinion, therefore, that in those counties which have failed to adopt the compulsory school attendance statutes a child may not be proceeded against in a juvenile court as a "neglected" child solely for the reason that the child is not attending public schools.

SCHOOLS—Compulsory Attendance—When child to be excused.

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

February 19, 1963

I am in receipt of your letter of February 12, 1963, in which you state that the compulsory school attendance law—§§ 22-275.1 et seq., Code of Virginia (1950) as amended—has been placed in force in Nelson County in the manner prescribed by § 22-275.24 of the Virginia Code. In this connection, you present the following inquiries:

"My main question concerns the effect of the provision of Sec. 22-275.4, which states that the School Board shall excuse from attendance at school any pupil whose parent conscientiously objects to his attendance at such school as is available, when such fact is attested by the sworn statement of the parent.

"In a prosecution of a parent for failing to send his child to school, can the parent simply make a sworn statement that he conscientiously objects to his child's attendance at such school as is available, and thereupon automatically cause the warrant to be dismissed by the Court?

"Another question concerns the statement in Sec. 22-275.11, and Sec. 22-275.20, stating that a child who does not go to school may be proceeded against as a neglected child, under Title 63 of the Code. Will the sworn statement of the parent, given under Sec. 22-275.4, be an absolute bar to a proceeding to have the child declared as a neglected child?"

In pertinent part, § 22-275.4 provides that:

"... notwithstanding any other provisions of this article, the school board shall excuse from attendance at school any pupil whose parent, guardian or other person having custody of such pupil conscientiously objects to his attendance at such school as is available, when such fact is attested by the sworn statement of such parent, guardian or other person."

I am of the opinion that the above-quoted provision contemplates that the sworn statement of a parent shall be made to, and the child involved excused by, the school board concerned in order for the parent or child to be exempt from the requirements of the law under consideration. Although a school board has no discretion with respect to excusing a child once the sworn statement has been made, the law does not authorize a court to excuse a child from school attendance because of the conscientious objection of his parent as attested by the sworn statement of such parent made to a court after a prosecution for violation of the compulsory attendance law has been instituted. I am, therefore, constrained to believe that a parent in the situation you describe is not entitled to have the warrant in question automatically dismissed by the court.

With respect to your second inquiry, I am of the opinion that the phrase
"such child or children"—as the quoted term is utilized in the terminal sentence of § 22-275.11—should be construed to include only those children "who are not exempt from school attendance" as prescribed in § 22-275.10 of the Virginia Code. Moreover, only those children permitted to be habitually absent from school "contrary to the provisions" of the compulsory school attendance law are deemed neglected children under the provisions of § 22-275.20 of the Virginia Code. Children who have been excused from attendance pursuant to § 22-275.4 would be exempt from school attendance and would not be habitually absent from school in contravention of the compulsory school attendance law. I am, therefore, of the opinion that children excused from school attendance in the manner prescribed in § 22-275.4 would not be subject to proceedings under Title 63 of the Virginia Code as mentioned in §§ 22-275.11 or 22-275.20. In this connection, it appears that the substance of the provisions of Title 63 of the Virginia Code, to which reference is made in §§ 22-275.11 and 22-275.20, are now embraced in corresponding provisions of the Juvenile and Domestic Relations Court Law. See, §§ 16.1-158 et seq., Code of Virginia (1950), as amended.

SCHOOLS—Contracts—Authority of county.

December 3, 1962

HONORABLE E. SUMMERS SHEFFEY
Commonwealth's Attorney for Washington County

This is in reply to your letter of November 26, 1962, which reads as follows:

"In 1948, the Washington County School Board and the Central School Board of the Town of Abingdon separately entered into a contract with the Bristol Virginia School Board for the education of Negro high school pupils from the Town of Abingdon and Washington County in Douglas High School in Bristol. In this agreement, the two School Boards agreed to pay the City of Bristol School Board the per capita operational cost based on average daily attendance. This contract is still in effect.

"The Bristol Virginia School Board now proposes to make an addition to the Douglas High School plant at an estimate cost of $125,000 plus $62,500 interest on the $125,000 loan and requests the Washington County School Board and the Central School Board of the Town of Abingdon to participate in the re-payment of this loan on an average daily attendance basis. It is estimated that the cost would be about $42.85 per pupil in average daily attendance so long as the Town of Abingdon and Washington County has a Negro child enrolled in Douglas High School or until this loan is retired in full including interest.

"My question is this: In meeting this request of the City of Bristol would it be legal for the county to make a charge for capital outlay or for debt service?"

Section 22-219 of the Code, as amended, provides the method for making contracts of the nature stated in your letter. Under this section in those cases where the tuition charge is payable by the school board, the contract price may be in such amount as may be fixed by the contract in excess of the total per capita costs so as to take into consideration the capital outlay and debt service. This expense may be included in the regular school budget.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Contracts—Competitive bidding not required unless State-aid project involved.

HONORABLE JAMES S. EASLEY
Commonwealth's Attorney for Halifax County

This is in reply to your letter of July 19, 1962, in which you ask whether or not the School Board of Halifax County is required to submit to competitive bids a contract for the construction of a new building for the purpose of repairing and maintaining school buses owned by it when all of the funds expended in the project will be provided out of local revenues.

In my opinion, competitive bidding is not required in this instance. Article 1.2 of Chapter 9 of Title 22 requires competitive bidding where the project is a "State-aid project" as defined in § 22-166.8 of the Code of Virginia.

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SCHOOLS—Contracts—Revisions.

DR. WOODROW W. WILKERS
Superintendent of Public Instruction

This will acknowledge receipt of your letter of December 6, 1962, which reads as follows:

"The City of Williamsburg and the County of James City operate a joint school system under a contract which was approved by the General Assembly (Section 22-7.1). This contract was developed locally and was approved by the school boards and the governing bodies of the county and city before it was sent on for approval by the State Legislature.

"At present, consideration is being given to the construction of additional buildings. The existing contract provides for ownership of such additional buildings on a 50-50 basis regardless of the extent of contribution made by each of the two parties.

"We have been asked by the local division superintendent of schools for the City of Williamsburg and the County of James City to secure an opinion on the following questions:

"1. If the local school boards and governing bodies agree that the additional buildings, if and when constructed, will be owned in proportion to the amount of funds furnished by each party for the construction of these buildings, will such agreement necessitate further action by the General Assembly?

"2. If the revised plan of ownership for the new buildings is agreed upon by the parties to the contract and put into effect, without the approval of the General Assembly, will such failure to secure the approval of the General Assembly invalidate the whole contract?

"3. If a manner of dissolution of the contract different from that now provided in the same should be agreed to, as one of the parties now desires, should not the dissolution clause be in the hands of the school boards rather than the hands of the governing bodies?"

The contract to which you refer was the subject of consideration by this office in an opinion to the late Dowell J. Howard, Superintendent of Public Instruction, dated December 12, 1955, and published in the Report of the Attorney General (1955-1956), p. 182. In that opinion we held that a proposed revision of the con-
tract set forth an incidental procedure with respect to a detail of administrative policy under the contract and such revision could be made without the necessity of being authorized by the Legislature or subsequently ratified by that body. The proposal to amend the agreement in such manner as to make a material or basic change in the provision with respect to the proportion of ownership of each governmental unit would, in my opinion, require legislative sanction. The provisions of § 22-7.1 of the Code are not, in my opinion, broad enough to permit a change in the contract of the nature proposed. The contract itself does not contain a provision for a modification of a basic character. The change proposed is not merely an administrative detail but it would constitute a drastic revision of a very essential essence of the agreement that has been approved by the General Assembly. The answer to your first question is in the affirmative.

Your second question is answered in the negative. The contract now in effect is valid because it has been ratified by the General Assembly. An invalid subsequent agreement would not, in my opinion, have the effect of invalidating the agreement now in existence.

With respect to question 3, Section 111 of the present contract requires the consent of all the parties to the contract for dissolution and, of course, must be respected. However, if a new valid contract is entered into, it could provide for dissolution in the manner suggested. This is purely a policy matter.

SCHOOLS—Land Acquisition—School board not authorized to purchase land for which unsecured notes are given in payment.

October 1, 1962

HONORABLE NATHAN B. HUTCHERSON, JR.
Member, House of Delegates

This is in reply to your letter of September 28, 1962, in which you request my opinion as to whether or not the School Board of Franklin County may purchase real estate for public school purposes and spread the payments over a period of three years, giving unsecured notes for these payments. An arrangement of this nature would, in my opinion, be contrary to the provisions of Section 115a of the Constitution, with which you are no doubt familiar.

In this connection, I enclose copy of an opinion dated January 14, 1959 to Honorable Baldwin G. Locher, which is published in the Report of the Attorney General (1958-1959), p. 258, and it relates to a similar question. A debt of the nature mentioned in your letter would require approval of the voters as prescribed by Section 115a of the Constitution. Any such debt made without the approval of the voters would not be valid.

In the event the school board should purchase this property, I wish to call attention to § 15-709.1 of the Code, which this office has construed to apply to transactions for the purchase of school property. That section and § 22-150 of the Code are the applicable statutes.

I am not sure that I understand the question raised in the second paragraph of your letter. However, I have grave doubt as to whether or not the school board would be permitted to expend public funds of the county for any purpose other than for the fee simple title to the real estate being acquired. Of course, the damage to the adjacent real estate might be taken into consideration by the seller in determining the sale price of the property to which the county will receive title.
This is in reply to your letter of November 15, 1962, which reads as follows:

"I would like your opinion on the following matter.

"The present high school facilities and equipment are inadequate in the North Fork Magisterial District of Washington County. In view of the small high school enrollment in this District and the low taxable wealth therein, it is desirable that this District contract with another Magisterial District in the County to the effect that the high school pupils residing in the North Fork Magisterial District might attend a high school outside their District. Of course, if this agreement were entered into between the Districts in question, it would be desirable that the residents of the North Fork Magisterial District share in the bonded indebtedness and literary loan obligations to the extent of enrollment of the North Fork pupils in a high school in another district.

"Accordingly, my question is this: Would it be legal for the Board of Supervisors to lay a levy on the taxable property in the North Fork Magisterial District to be used to retire the bonded indebtedness and literary loan obligations of the district where these high school pupils are enrolled if a majority of the voters by an election held in accordance with the law approve such an agreement?"

With respect to the indebtedness created on account of literary loans in one magisterial district, it would seem that under the provisions of § 22-42 of the Code, as amended by Chapter 77 of the Acts of 1962, the Board of Supervisors could levy a tax in the two districts to which you refer for the purpose of paying off the literary fund indebtedness heretofore incurred.

With respect to the question of the bonded indebtedness, I believe it would be necessary for a referendum to be held in both magisterial districts upon the question as to whether or not bonds shall be issued as joint obligations of these districts under § 15-666.32:1, the proceeds of which would be applied to the retirement of the bonds now outstanding as obligations of one district. I do not believe the board of supervisors would be authorized to lay a levy in the North Fork District for the payment of the outstanding obligations of the other district without the approval of the voters of both districts for the issuance of joint obligation bonds.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—School Boards—Appropriations—No authority to supplement teacher retirement.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—Political Subdivisions—Arlington County not included.

HONORABLE WILLIAM J. HASSEN
Commonwealth's Attorney for Arlington County

June 3, 1963

This is in reply to your letter of May 29, 1963, which reads as follows:

"The Arlington Education Association has requested an opinion as to whether it is "... legal for the Arlington County School Board to appropriate funds for the purpose of supplementing the state retirement benefits of Arlington teachers."

"I would appreciate it if you would furnish me with a ruling as to the legality of this supplementing by the School Board, and in the event that it is not legal for the School Board to make such a supplement to the appropriation, whether it would be legal for the Arlington County Board to appropriate funds for such a purpose."

Section 51-112 of the Code, as amended, authorizes the counties, cities and towns to establish a pension system for the officers and employees of such counties, cities and towns. The last paragraph of this section provides:

"For the purpose of this section the term employees may include teachers or other employees of city and town school boards."

Under the provisions of § 15-10, the counties coming within either classification set forth therein are vested with the same powers and authorities of cities and towns. This office has ruled on several occasions that the words "powers" and "authorities" relate to such as are conferred under general law to cities and towns and not under charter provisions. Inasmuch as the terminal paragraph of § 51-112 is a general law and the county of Arlington comes within the scope of §15-10, in my opinion, the county may establish the pension system for teachers as contemplated by § 51-112 of the Code.

Of course, the school board may only expend public funds for this purpose after the same have been appropriated by the governing body of the county. The school board has no power to appropriate funds; it may spend only those funds which are appropriated to it and for the purposes for which the appropriations were made.

It is my understanding from the Director of the Virginia Supplemental Retirement System that Arlington County has not elected to participate in the State System as provided in Article 4, Chapter 3.2, Title 51 of the Code.

SCHOOLS—School Boards—Public Records—Minutes of meetings.

PUBLIC RECORDS—Minutes of School Board Meetings.

DR. WOODROW W. WILKERSON
Superintendent of Public Instruction

February 5, 1963

This is in reply to your letter of January 25, 1963, in which you present three questions at the request of counsel for the School Board of Lynchburg. These questions are as follows:
1. Is it the duty of the Clerk to record the minutes of meetings of the School Board in a bound volume before they have been approved by the Board and signed by the Chairman and the Clerk?

2. Are the notes, memoranda or minutes of proceedings at a meeting of the Board open for inspection of a citizen before the minutes of the meeting have been approved by the Board and made a part of the bound record?

3. Does the School Board have the right to withhold certain information at the request of the City Council or other governing body?

The applicable statutory provisions are §§ 22-52 and 22-53 of the Code, which read as follows:

"§ 22-52.—Complete and accurate minutes of all meetings shall be kept and signed by the chairman and clerk."

"§ 22-53.—The clerk of the county school board or city school board shall keep in a bound volume a record of the meetings and proceedings of the board including all bids submitted on any building, material, supplies, work, or project to be let to contract by such board, and in another book a receipt and disbursement record as prescribed by the State Board, showing a record of his own official acts, and shall keep on file vouchers, contracts and other official papers, all of which shall be open to the inspection of the division superintendent of schools, and, at all reasonable times for a period of three years after recordation, the inspection of every citizen of the county or city. They shall be subject to such periodical examinations as shall be prescribed or approved by the State Board. He shall discharge, under the general direction of the division superintendent such other duties in connection with the school business of the county or city as may be required of him by the school board, or the State Board." (Italics supplied)

In considering these questions and the proper interpretation of the Code sections just cited, it is appropriate to call attention to House Joint Resolution No. 74, passed at the 1958 session of the General Assembly, which reads as follows:

"Whereas, the Commonwealth of Virginia was the leader in the framing of the Bill of Rights in 1789 and has always played a vital role in guaranteeing the rights of individuals and establishing safeguards for the protection of individual liberties; and

"Whereas, the right of the people to know of the activities of their government is an essential right, and access to public records is a part of this right that must never be abridged; now, therefore, be it

"Resolved by the House of Delegates, the Senate concurring, that the General Assembly deplores unnecessary secrecy at every level of government, federal, state and local.

"Be it further resolved, that the General Assembly urges upon all agencies of government a policy granting the public full access to information consistent with (1) the national security, (2) the protection of the privacy of individuals in personal matters not related to public business, and (3) the premature disclosure of information where such disclosure would be harmful to the public interest, in making official records and meetings of official bodies open to the public."

Although Resolution No. 74 does not have the force of a statute, nevertheless, it is an expression of the attitude of the General Assembly on this subject.

On January 29, 1940, the question of the right of the public to inspect the records of school boards and boards of supervisors was considered by the Honorable Abram P. Staples in an opinion to a member of the House of Delegates, in which Mr. Staples made the following observation:
"In your letter of January 25 you ask for my opinion regarding the right of the public to inspect the records of the school boards and the boards of supervisors.

"The records of these bodies, including the minutes of their meetings, are public documents and, so far as they are of direct interest to an individual, or of public concern, I am of the opinion that any person, individually interested, has a right to inspect the records directly concerning him, and, that, where it is a matter of serious public concern, a taxpayer and citizen, although not himself personally interested, has a right to access to such of the records as may reasonably include the subject of public interest about which he desires information.

"The right to access of public records is one spoken of as an absolute right, but the courts have held that there must be a sufficiency of purpose for which the applicant for the records desires the inspection. Not only must there be sufficient purpose but the custodian of the records may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and the inspection must be had in such manner and at such times as not to interfere with the business of his office.

"In this connection see 23 R.C.L. pages 160-164, Gleaves v. Terry, 93 Va. 491, and Keller v. Stone, 96 Va. 667."

This opinion was published in the Report of the Attorney General (1939-1940), p. 192. As indicated by Mr. Staples' opinion, the public is entitled to be informed concerning the official actions of public bodies. The object of § 22-53 is to assure that this principle will not be denied in those cases where the purpose is proper. The object of requiring a bound volume in which to preserve a record of board meetings and other proceedings is not, in my judgment, intended to prohibit a proper person from examining the records and proceedings prior to the time they are incorporated in the bound volume. The bound volume, in my opinion, is for the purpose of assuring permanency of the records. It will be observed that every citizen of the city would have the right to inspect the records of the board at any reasonable time before the expiration of three years after the records are incorporated in the bound volume. I do not construe the phrase "at all reasonable times for a period of three years after recordation" to mean that the citizens do not have the right to inspect the records at reasonable times before recordation, but that the phrase "for a period of three years after recordation" is a limitation upon the time this right shall be mandatory. With respect to the specific questions, in light of the foregoing observations, it is my opinion that the answer to question 1 is in the negative, and the answer to question 2 is in the affirmative.

While the purport of your concluding question is not entirely clear. I am of the opinion that the City Council has no control over the school board's right to release information nor its duty to make available for inspection the documents mentioned in § 22-53. If there exists in the office of the school board a record which would, under this statute be available for inspection by an interested citizen, the school board could not withhold such document from inspection because of a request to that effect by the City Council. In short, the obligation placed upon the school board by the statute cannot be diminished by the City Council.
REPORT OF THE ATTORNEY GENERAL 237

SCHOOLS—School Property—Land lying partly in town—How boundary to be changed.

TOWNS—Boundaries—How school property lying partly in county may be incorporated in town.

March 8, 1963

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney of Montgomery County

This will acknowledge receipt of your letter of March 6, 1963, in which you ask whether or not the property owned by the School Board of Montgomery County, part of which is in the town of Christiansburg, can be taken wholly into the town, to be classified within the corporate limits of the town of Christiansburg, with the concurrence of the School Board of Montgomery County.

It appears from your letter that the location of the school within the corporate limits of the town would result in a saving of money to the county by the school board.

The provisions under which county territory may be annexed or otherwise become a part of a town are set forth in Chapter 8 of Title 15 of the Code. Section 15-152.2 of this chapter reads as follows:

"The boundaries of the cities and towns of this Commonwealth shall be and remain as now established unless changed as provided in this title."

Section 126 of the Constitution provides:

"The General Assembly shall provide by general laws for the extension and the contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid."

Chapter 8 of Title 15 of the Code implements this constitutional provision. In view of these statutory and constitutional provisions, it is obvious that the corporate limits of the town may not be expanded in the manner suggested by you.

SCHOOLS—Teachers—Right of citizen to examine contracts.

PUBLIC RECORDS—School Board Contracts—Right of public to examine.

March 8, 1963

HONORABLE WILLIAM W. JONES
Commonwealth's Attorney for Nansemond County

This is in reply to your letter of March 7, 1963, in which you present the following question:

"Is a School Board required to furnish to an inquiring citizen a list of all persons employed, showing the salary for each such employee?"
Under § 22-53 of the Code, records of a school board, as contained in the office of the clerk of the school board, which includes contracts and all other official records, shall be open at all reasonable times for the inspection of every citizen of the county. This section has not been construed to mean that there would be a duty upon the clerk to make up a list of the teachers, together with their salaries, and furnish such list to such citizen who might make application therefor. However, any citizen has the right under this section to examine the contracts relating to the school teachers and make memoranda therefrom.

In this connection, I am enclosing copy of an opinion recently issued to Dr. Woodrow W. Wilkerson with respect to this section of the Code.

SCHOOLS—Transportation—When cost of private schools may be paid by government.

HONORABLE WILLIAM J. PHILLIPS
Commonwealth's Attorney for Warren County

I am in receipt of your letter of September 17, 1962, in which you present several questions concerning nonsectarian private schools. These questions will be stated and considered seriatim.

"1. Can the Board of Supervisors legally make funds available for transportation of children attending John S. Mosby Academy, a private non-sectarian school?"

Answer: Yes. Section 22-115.36 of the Virginia Code authorizes the governing body of any county, city or town to appropriate and expend funds for educational purposes in furtherance of the elementary and secondary education of children between the ages of six and twenty years residing in such county, city or town, under such uniform regulations, in such amounts and to such persons, associations or corporations as the governing body of the county, city or town may, by ordinance, provide. I am of the opinion that this statute empowers the Board of Supervisors of Warren County to make funds available for the transportation of children attending a non-sectarian private school.

In addition, § 22-294.1 of the Virginia Code provides that the school board of any county may provide transportation for any child enrolled in and attending a nonsectarian private school, and § 22-294.2 further provides that any school board may, in lieu of furnishing the transportation authorized by § 22-294.1, allot funds "to assist parents of children attending nonsectarian private schools in paying the cost of other means of transportation." Implementing these statutes is § 22-294.3 of the Virginia Code which authorizes the governing bodies of the various counties to appropriate such funds as in their judgment may be necessary to carry out the provisions of §§ 22-294.1 and 22-294.2.

"2. Will the State participate in the cost of this transportation and in what amount?"

Answer: If funds are made available by the Board of Supervisors of Warren County for distribution in accordance with §§ 22-294.1 and 22-294.2, reimbursement from State funds may be obtained to the extent specified in these statutes. However, no similar provision for reimbursement from State funds is made.
with respect to sums appropriated and expended in accordance with § 22-115.36 of the Virginia Code, and I am, therefore, of the opinion that no reimbursement from State funds would be available for amounts expended under the latter statute.

"3. Can a child who normally attends a segregated public school but who chooses to attend a non-sectarian private school be denied a tuition grant?"

Answer: No. Every child in this Commonwealth between the ages of six and twenty, who has not finished nor graduated from high school and who desires for any reason to attend a nonsectarian private school located in or outside, or a public school located outside the locality in which such child resides, is eligible and entitled to receive a tuition grant under the provisions of § 22-115.29 et seq. of the Virginia Code.

SCHOOLS—Transportation—When public funds may be used.

May 20, 1963

HONORABLE JOHN C. WEBB
Member, House of Delegates

This is in reply to your letter of May 16, 1963, which reads as follows:

"Your opinion on the following question would be appreciated: May the General Assembly of Virginia constitutionally enact legislation that would authorize the counties and cities to furnish public transportation for students attending private and parochial schools not supported by public funds?

"There is one further question: Would the expenditure of public funds for such purposes be constitutional?"

The 1956 amendment to Section 141 of the Virginia Constitution authorizes the governing bodies of counties, cities and towns to appropriate funds for educational purposes in furtherance of the education of Virginia students in nonsectarian private schools. With this exception (and two others not here material), Section 141 of the Virginia Constitution forbids the appropriation of public funds to any school or institution of learning not owned or exclusively controlled by the State or a political subdivision. I am, therefore, of the opinion that the General Assembly of Virginia may enact legislation authorizing counties and cities to furnish public transportation for Virginia students attending private nonsectarian schools, but not parochial or sectarian schools.

This view has apparently been adopted by the General Assembly in the enactment of §§ 22-294.1 through 22-294.3 of the Code of Virginia (1950), as amended. These statutes, in effect, authorize local school boards and governing bodies to provide transportation, or assist in providing transportation, for children attending nonsectarian private schools, but not sectarian or parochial schools.

In light of the opinion expressed above, it follows that public funds may be expended for the purpose of furnishing public transportation for students attending private, but not parochial, schools.
SCHOOLS—Tuition—Children of war veterans.

HONORABLE DAVID B. MOYER
Bursar, University of Virginia

This will acknowledge receipt of your letter of September 7, 1962, in which you refer to § 23-7.1 of the Code and Item 22 of the Appropriation Act of 1962. These provisions relate to education benefits to children of persons killed or disabled due to war service.

Your letter, in part, reads as follows:

"I enclose photo-stat of a letter from Mr. Harry F. Carper, Jr. in which he quotes an opinion from your office that '... out of state students are entitled to free tuition the same as those residing in Virginia,...'

"The tuition for out of state students in the College of Arts and Sciences of the University of Virginia is currently $750.00 for a session. The Appropriations Act provides a maximum amount payable of $400.00 in any one year, and further provides, '2. the sum paid to any child from this item shall be reduced by the value of free tuition in State institutions, and by the amount of aid payable to the child pursuant to Federal law;...'

"We would like to be advised as to whether, (1) the free tuition to students shall be limited to the $400.00, or such pro-rata amount thereof as may be available from funds appropriated for this item; and (2) if the free tuition is to be greater than the aforementioned $400.00 is the University relieved of accountability for such tuition not collected."

Under the provisions of § 23-7.1 of the Code, a person qualifying as to eligibility under paragraph (1) will be entitled under paragraph (2) to attend the University of Virginia free from any tuition charge, regardless of his place of residence, since the free tuition charge applies to students living outside of and within this State. Therefore, a nonresident student would not be entitled to participate in the funds appropriated by Item 22 of the Appropriations Act, since the amount of the free tuition must be deducted and it is greater than $400.00. In those cases where the free tuition plus the amount of aid payable pursuant to Federal law is less than $400.00, the difference between this total and $400.00 may be paid for "institutional fees, board and room rent and books and supplies."

The answer to your question (1) is, therefore, in the negative. As to your question (2), the University will not be accountable for the tuition fee in such cases, except that the records in your office should show why the tuition was not collected, supported by the certificate of the Director of the Division of War Veterans' Claims covering the eligibility of the student.

SCHOOLS—Tuition—When reduced fees for State residents applicable.

HONORABLE EDGAR E. WOODWARD
Bursar, Mary Washington College

This will acknowledge receipt of your letter of September 4, 1962, in which you inquire whether or not Miss Tyla Matteson is entitled to reduced tuition privileges under § 23-7 of the Code. This section was amended at the 1962 Session of the General Assembly so that it now provides as follows:
"No person shall be entitled to the admission privileges, or the reduced tuition charges, or any other privileges accorded by law only to residents or citizens of Virginia, in the State institutions of higher learning unless such person has been domiciled in, and is and has been an actual bona fide resident of Virginia for a period of at least one year prior to the commencement of the term, semester or quarter for which any such privilege or reduced tuition charge is sought, provided that the governing boards of such institutions may require longer periods of residence and may set up additional requirements for admitting students."

Under the facts stated by the father of the young lady in a letter to you dated August 27, 1962, it appears that Miss Matteson and her parents have been living in the city of Hampton for more than one year as of August 27, 1962. Under these circumstances, I am of the opinion that Miss Matteson is entitled to the benefits of this section. The fact that her parents continue to vote in the State of New York would not deprive the young lady of this privilege, since she is undoubtedly a resident of this State.

SCHOOLS—Tuition—Who entitled to reduced fees.

September 17, 1962

HONORABLE EDGAR E. WOODWARD
Bursar, Mary Washington College

This will acknowledge receipt of your letter of September 14, 1962, relating to Sandra L. Mueller, whose entitlement to the benefits of § 23-7 of the Code is considered.

It would seem that this student qualifies for reduced tuition as a resident of Virginia. The parents state that they have lived in Springfield, Virginia, since 1956, but, due to military orders, they have been overseas since sometime in 1960, and are now stationed in Heidelberg, Germany; that they continue to own their home in Virginia, on which they pay taxes, and plan to live there whenever their military service will permit, and also plan to continue to make that property their home whenever the husband retires from the active service. It is presumed that the daughter's residence status is the same as that of her parents.

This office has held that whenever a person establishes his residence in this State he retains that status, even though he may subsequently move to another place, if he retains the intention of returning at some future date, and does not, in the meantime, establish a residence elsewhere.

In light of the statement made by the parents of this student in their letter to you of September 11, 1962, I am of the opinion that Miss Mueller is entitled to the benefits of § 23-7 of the Code.

SCHOOLS—Tuition Grants—Applicability to city residents attending county schools.

June 10, 1963

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney of Roanoke County

This will acknowledge receipt of your letter of June 7, 1963, which reads as follows:
"Dr. Herman L. Horne, Superintendent of Roanoke County Public Schools, has asked me to obtain from you a ruling on the following question:

"Can a parent who is a resident of the City of Roanoke, but who owns property in the County of Roanoke, upon which he pays school taxes amounting to $75.00, enter into an agreement with the School Board of Roanoke County not to apply for a tuition grant, but to pay the difference between the cost of tuition for the student, which is approximately $269.00, and the amount he pays for school taxes which is $75.00, and send his child to the Roanoke County School?"

Section 22-219 of the Code is the applicable statute with respect to the power of the School Board of Roanoke County to charge tuition to a nonresident. I know of no statute that would authorize the school board to enter into an arrangement of the nature suggested in your inquiry.

Under §§ 22-115.30 through 22-115.32, a child living in the City of Roanoke would be entitled to tuition grants from the City of Roanoke for attendance to a private or public school in the County of Roanoke to which he might be admitted.

SHERIFFS AND SERGEANTS—Authority of city sergeant to execute criminal process outside city.

March 28, 1963

HONORABLE JOHN R. PORTER, JR.
Clerk of the Court of Hustings for the City of Portsmouth

This is to acknowledge receipt of your letter of March 25, 1963, in which you state in part:

"In many cases arising in this Court, it becomes necessary for the City Sergeant of this City to execute criminal process outside of his city and for the Court to issue process for the appearance of witnesses who are located in various other cities and counties within this State. Many of these witnesses are inmates of penal institutions.

* * * * *

"I should greatly appreciate a ruling from your office as to whether or not there is any provision in the Code requiring the issuing of a special Court order in advance of the City Sergeant's complying with the process issued."

Section 8-300 of the Code of Virginia is as follows:

"Whenever the Commonwealth or a defendant in a criminal prosecution in any court of record in this State shall require as a witness in his behalf, a convict or jail prisoner in the penitentiary, or on the State farm, or in a State convict road camp, the clerk of such court, on the application of such defendant or his attorney, or the attorney for the Commonwealth, shall issue a summons for such witness and place it in the hands of the sheriff of the county, or sergeant of the city, as the case may be, who shall go where such witness may then be, serve him with such summons, and carry him to the court to testify as such witness, and after he shall have so testified and been released as such witness, carry him back to the place whence he came, for all of which service such officers shall be paid out of the criminal expense funds in the State treasury such compensation as the court in which the case is pending, may certify to be reasonable."
I am unable to find any other statutes which would cover the situation you present. It will be noted from § 8-300 that the clerk of the court issues the process upon the statement of the prosecuting attorney or the defendant that the prisoner is required as a witness.

I am, therefore, of the opinion that a special court order is not necessary before the city sergeant or the officer into whose hands it is placed executes the process.

SHERIFFS AND SERGEANTS—Deputies—Faithful Performance Bonds—Principal determines if deputies are to provide bonds.

October 25, 1962

HONORABLE KERMIT E. ALLMAN
City Sergeant for City of Roanoke

This will acknowledge receipt of your letter of October 23, 1962, regarding the status of employees of the City Sergeant’s office of Roanoke with respect to the execution of surety bonds, or faithful performance bonds. You state that the question has been raised whether or not the personnel in your office should be classed as city employees to be covered under a blanket bond for that class of city personnel. You request my advice with regard to this question.

In my opinion, the city sergeant is responsible to the city and the Commonwealth for the faithful performance of his obligations and that the question as to whether or not the deputies and other employees of the city sergeant should give bond should be determined by the city sergeant himself. In case such bond is given it should run in favor of the city sergeant.

Under Section 53-168, the sergeant is charged with the duty of keeping the jail. He may, however appoint one or more deputies to act as jailer, and it is provided in § 53-174 that if the person designated by the sergeant as jailer has executed a bond payable to the Commonwealth of Virginia with proper surety in an amount to be fixed by the judge of the appropriate court, the sergeant is thereupon relieved of responsibility for any acts of omission or commission on the part of the deputy acting as jailer.

We have discussed this matter with the office of the Auditor of Public Accounts, and we are advised by that office that the usual procedure is for sheriffs or sergeants to require bonds of their deputies and other personnel in the manner suggested in this letter.

SHERIFFS AND SERGEANTS—Execution of Writ of Possession in Unlawful Detainer—No duty to personally remove property.

March 27, 1963

HONORABLE J. C. KNIGHT, JR.
Sheriff of Nansemond County

This is in reply to your letter of March 26, 1963, in which you request my opinion with respect to the duties of a sheriff when a writ of possession in an action of unlawful detainer is placed in his hands, pursuant to § 8-402 of the Code. Specifically, you request my advice as to whether or not a sheriff in executing such a writ is required to manually remove household furnishings from the premises involved, or in lieu thereof, employ labor to perform this task.

The officer executing a writ of this nature is required to serve the writ and put the plaintiff in possession of the property. The fee allowed by statute for serving
a writ of possession is one dollar and fifty cents. See, § 14-116(13) of the Code. In executing writs of this nature, I believe the officer should arrange with the plaintiff, or with the plaintiff's counsel of record in the case, to meet at a time agreed upon with the officer at the premises involved in the proceeding for the purpose of serving the writ and placing the plaintiff in possession of the premises.

I am not aware of any statute that requires the officer executing a writ of this nature to personally manually remove the defendant's property from the premises or to employ at his expense labor to perform that task. The expense, if any, incident to the removal of such property (if the defendant does not remove the same) falls upon the plaintiff.

SHERIFFS AND SERGEANTS—Expenses—When county may participate.

COUNTIES— Appropriations—Expenses of Sheriff—Responsibility.

HONORABLE R. D. COLEMAN
Commonwealth's Attorney for Scott County

March 18, 1963

This is in reply to your letter of March 14, 1963, which reads as follows:

"The Sheriff of Scott County contracted with Two-Way Radio, Incorporated, for the maintenance of the two-way radios installed in the automobiles of the sheriff and his deputies for the sum of $75.00 per month, of which $50.00 is paid by the State and $25.00 by the County. This maintenance expense for the radios has been approved by the State Compensation Board and the Board of Supervisors. Both the State and the County each month send their respective payments of $50.00 and $25.00 directly to the Sheriff, who in turn pays the Two-Way Radio, Incorporated.

"I have been requested by the Board of Supervisors of Scott County to ask your opinion on the following questions:

"1. In the event the Sheriff becomes in arrears in paying Two-Way Radio, Incorporated the money which has been paid directly to him by the County for the maintenance of the radios, is the County liable for the amount in arrears?

"2. Would the County also be liable for the portion paid by the State directly to the Sheriff and upon which he becomes in arrears in paying Two-Way Radio, Incorporated?

"3. Can the Board of Supervisors lawfully withhold from the salary of the Sheriff the amount which he has become in arrears and pay same to Two-Way Radio, Incorporated?"

In my opinion, since the contract is between the sheriff and Two-Way Radio, Incorporated, there would be no obligation upon the county to make payments covering any arrears that may have occurred on account of failure of the sheriff to pay for the service. Therefore, the answer to your questions 1 and 2, in my opinion, must be in the negative.

With respect to question number 3, the sheriff's salary is fixed pursuant to statute and, in my opinion, no part of the salary may be voluntarily withheld for the obligations incurred by him.

The board of supervisors may make appropriations for the purpose of paying its proportionate share of the expenses of the county sheriff, pursuant to the monthly report made under § 14-87 of the Code. These payments to the sheriff are in the nature of reimbursements to him for valid expenses incurred by him. One
of the authorized expenses of a sheriff for which he is entitled to be reimbursed is maintenance and repair of the radio equipment in his official car. See, Code § 14-87.

SHERIFFS AND SERGEANTS—Fees and Commissions—Applicable statute—
When commission to be paid for conducting sale.

July 5, 1962
HONORABLE ADAIR W. MATTHEWS
Sheriff of Accomack County

This is to acknowledge receipt of your letter of June 26, 1962, in which you request my opinion as to the interpretation of the statutes imposing fees and commissions for officers. I shall answer your inquiries seriatim.

“1. Whether or not a sheriff who sells personal property under an execution is entitled to commissions, as set out in Section 14-120, or whether the amount of the sheriff's commission in such cases is set by Section 8-429? These sections seem to be in conflict.”

The pertinent portions of the applicable sections are as follows:

“§ 8-429. . . . After deducting from such money a commission of five per centum and his necessary expenses and costs, including reasonable fees to counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under a writ of fieri facias on the judgment, returnable at the end of such thirty days.”

“§ 14-120.—An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum of the first one hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum on the residue; except that when such payment or sale is on execution on a forthcoming bond, his commission shall only be half what it would be if the execution were not on such bond.”

It will be noted that the commission paid under § 14-120 on small collections are somewhat greater than the commissions prescribed in § 8-429. Both of these sections appeared in the Code of 1919. The commissions under § 14-120 were increased by the Acts of 1920 from five per centum on the first $300.00 to the present amount. However, the commissions under § 8-429 remained the same. In a letter to the Honorable J. Gordon Bennett, dated March 14, 1957, this office expressed the opinion that a sheriff was entitled to the fees prescribed in § 14-120 when a fieri facias is placed in his hands and a levy is made thereunder and the judgment paid. See, Report of the Attorney General, (1956-1957), p. 239. I am of the opinion that inasmuch as § 14-120 has been amended since § 8-429, the provisions of that section control insofar as the amount of the commissions are concerned.

“2. If the sale is made pursuant to an order of sale rendered in an attachment proceeding or under a distress warrant, would the amount of the commissions be governed by Section 14-120 or by Section 8-429?”

The amount of commissions should be governed by § 14-120.

“3. Whether or not all commissions allowed a sheriff are regarded as 'fees,' which are required to be reported to the treasurer of the county on form number 17 designated Report of Fees Collected?”
REPORT OF THE ATTORNEY GENERAL

I am of the opinion that the commissions allowed a sheriff should be regarded as fees insofar as the requirement to report same to the treasurer is concerned. In an opinion to the Honorable Curtis A. Sumpter, Commonwealth's Attorney for Floyd County, dated June 9, 1953, the Honorable J. Lindsay Almond, Jr., then Attorney General, ruled that such commissions on collections should be paid to the treasurer of the county for credit to such State and county funds as other sheriff's fees are credited. See, Report of the Attorney General (1952-1953), p. 101. I concur in this view.

"4. Whether or not the sheriff or his deputy may act as auctioneer or common crier when selling under a writ and is he entitled to retain fees normally paid to the auctioneer or common crier for this service, provided the sheriff or deputy had obtained a license as an auctioneer or common crier?"

Section 8-428, Code of Virginia (1950) provides:

"No such officer or his deputy shall act as auctioneer or common crier except when selling under a writ, unless he first obtains a license to conduct the business of an auctioneer or common crier. Any violation of this or the preceding section shall be punishable by a fine of not less than one hundred nor more than five hundred dollars."

The answer to this question is in the negative. When the sheriff sells property under a writ, he does so as an officer of the court and not as a private auctioneer or common crier. He is not entitled to retain the fees but must pay them to the county treasurer as required by law.

"5. Whether or not there is any prohibition against a sheriff or deputy sheriff conducting the business of an auctioneer or common crier at any private sale for compensation, if said sheriff or his deputy had obtained the proper license?"

There is no prohibition against a sheriff or deputy sheriff from conducting the business of an auctioneer or common crier at a private sale, provided he is properly licensed. See, § 8-428 of the Code.

SHERIFFS AND SERGEANTS—Fees—Defendant not required to pay for summoning witnesses when acquitted.

CRIMINAL PROCEDURE—Costs—Defendant not required to pay for summoning witnesses when acquitted.

April 24, 1963

HONORABLE MARSHALL E. HANGER
City Sergeant for City of Staunton

This is to acknowledge receipt of your letter of April 1, 1963, in which you state, in part:

"The Clerk of the Corporation Court for the City of Staunton has never assessed the issuance fee upon a finding of not guilty, however, I, as City Sergeant, have always required that defendants pay the costs of execution, i.e., service fee, regardless of outcome.

"Several of our local attorneys have questioned my right to such
fees in light of the fact that the Clerk is now apparently not supposed

to recover the issuance fee.

* * *

"Would you please render your opinion on the above situation."

Section 14-122 sets forth the fees and allowances for sheriffs and sergeants

in criminal cases. The fee and allowance for summoning a witness in a felony

case is forty cents; the fee for summoning a witness in a misdemeanor case is

fifty cents. Section 14-166, which provides that an officer should not be com-

pelled to perform any service unless his fees are paid, expressly provides that

the payment shall not be required in criminal cases. It will be noted from

§ 14-123 that a clerk of a circuit or corporation court may charge a fee for

issuing a summons for witnesses amounting to twenty-five cents. The 1954

amendment to this section changed the word "shall" in the preliminary para-

graph to "may". That section also provides that upon conviction in felony cases,

in lieu of any fees otherwise allowed by said section the clerk shall charge the

accused ten dollars, and likewise upon the conviction in other criminal cases,

in lieu of the fees otherwise allowed by this section the clerk shall charge the

accused five dollars. I am unable to find any statute which would impose costs

upon the defendant where he has been acquitted. If § 14-122 is so construed,

it would have the effect of imposing a fine upon an accused upon his acquittal,

which, of course, cannot be done.

I am, therefore, of the opinion that a defendant who has been acquitted of

a criminal offense cannot be compelled to pay the cost of summoning witnesses

represented by fees and allowances for sheriffs and sergeants under the provi-

sions of § 14-122 of the Code of Virginia.

SHERIFFS AND SERGEANTS—Hours of Work.

August 27, 1962

HONORABLE L. R. SUMMERS
Sheriff of Pulaski County

This will acknowledge receipt of your letter of August 24, 1962, which reads

as follows:

"Will you please give me a ruling on how many hours a day or week

the Sheriff and Deputies are supposed to work.

"We have been putting in anywhere from sixty or ninety hours a

week and our Board of Supervisors have refused to give me additional

help.

"We expect to work the required number of hours, but are unable

to keep up the work by putting in the hours that we have been work-

ing."

There is no statute fixing the number of hours per day during which a

sheriff and his deputies must work. The sheriff of a county is a constitutional

officer, elected by the people, and required to perform such duties as may be

prescribed by law. See Section 110 of the Constitution. The salary and expenses

of a sheriff's office are subject to the provisions of Article 9, Chapter 1, Title 14

of the Code. As to the number of full-time and part-time deputies to which a

sheriff is entitled, you are referred to § 14-83 of the Code, which entitles a

sheriff to appeal to the circuit court of his county in the event he is not

satisfied with the number of deputies authorized by the State Compensation

Board.
SHERIFFS AND SERGEANTS—Sergeant of the City of Franklin—Authority to execute process beyond corporate limits. September 11, 1962

HONORABLE J. VAUGHAN BEALE
Commonwealth’s Attorney for Southampton County

This is in reply to your letter of September 10, 1962, requesting my opinion as to whether or not the Sergeant of the City of Franklin (a city of the second class) has authority by virtue of the laws of the State and the charter of the City to serve civil and criminal papers returnable to courts of record on persons residing in the City. You enclosed a letter from Mr. J. Edward Moyler, Jr., City Attorney of Franklin, in which he cites Section 15.01 of Chapter 15 of the Charter of the City of Franklin (Acts of Assembly, 1962, Chapter 155), as follows:

“The council may appoint a city sergeant, who may be a member of the police force. He shall be paid such salary as the council may fix and all fees collected by him shall belong to the city. The council may appoint such deputy city sergeants as may be necessary. The sergeant and any deputy city sergeants shall have the authority and powers and jurisdiction which is granted to sergeants of other cities of the class of Franklin by the general laws of the Commonwealth of Virginia and the ordinances of the City of Franklin and they shall perform such duties as may be prescribed by the State laws and the ordinances of the City of Franklin. The city sergeant shall be conservator of the peace and in criminal matters or offenses the city sergeant and deputy city sergeants shall have jurisdiction for one mile beyond the city limits of Franklin in enforcing the criminal laws of the Commonwealth of Virginia. Any vacancies in the office of city sergeant and deputy city sergeants shall be filled by the council.”

I am enclosing copy of an opinion of this office furnished to the City Sergeant of Virginia Beach on December 30, 1953, which relates to your question. In that opinion, we held that the sergeant and the sheriff of the adjoining county had concurrent jurisdiction within the City of Virginia Beach under the general law. The charter provision cited by Mr. Moyler expressly preserves to the sergeant all of the powers granted under the general laws.

In my opinion, the Sergeant of the City of Franklin has authority to execute both civil and criminal process within the city and to a distance of one mile beyond the corporate limits of the city.

STATE EMPLOYEES—No Prohibition Against Holding Political Office.

PUBLIC OFFICERS—Eligibility—No prohibition against State employees holding political office. September 27, 1962

HONORABLE H. SELWYN SMITH
Commonwealth’s Attorney for Prince William County

This is in reply to your letter of September 24, 1962, in which you request my opinion with respect to a question presented by Honorable C. E. Gnadt, Commissioner of the Revenue, of your county. Mr. Gnadt’s letter is, in part, as follows:

“It has been brought to my attention that State employees are precluded from being a candidate for or holding any political office. My
question is—can an employee of the State of Virginia be a member of a political committee which is elected by the people.”

We have contacted the Personnel Division of the State and find that there are no regulations which would prohibit a State employee from holding a political office. At the present time there are some employees who do hold political office, such as officers of city and town councils.

With respect to whether or not an employee of the State may be a member of a political committee, which is elected by the people, you are advised that there are no regulations of that nature. Some of the State employees are members of local county political committees.

Of course, there are certain groups of employees who may be prevented from holding political office, or from serving on a political committee under the federal Hatch Act. This Act applies to certain departments of the State which receive federal grants for administrative purposes.

STATE INSTITUTIONS—Claims for Tuition—How to be discharged.

STATUTE OF LIMITATIONS—State Educational Institutions—§ 8-35 of Code applies.

HONORABLE C. P. MILLER, JR.
Assistant Comptroller

August 13, 1962

This will acknowledge receipt of your letter of August 9, 1962, to which is attached a letter from Dr. George J. Oliver, President of Richmond Professional Institute, dated August 7, 1962, in which advice is sought as to what disposition should be made of certain delinquent tuition accounts due the Institute, as follows:

$ 2,229.27 Prior to June 30, 1942
1,059.23 July 1, 1942—June 30, 1945
7,742.17 July 1, 1945—June 30, 1951
9,105.73 July 1, 1951—June 30, 1956
9,057.00 July 1, 1956—June 30, 1959

$29,193.40 Adjusted Delinquent

Dr. Oliver states that RPI has made every effort to collect these accounts, including two collection agencies, and, obviously, he considers these accounts to be uncollectible. The provisions of § 8-13 of the Code, relating to limitations of actions generally, would seem to be applicable in this instance. Assuming that these accounts are all open accounts, the statute of limitations would be a valid defense to each of these claims.

In this connection, I wish to call attention to § 8-35 of the Code, which reads as follows:

"Except as hereinafter provided no statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same but agencies of the State incorporated for charitable or educational purposes shall be subject to statutes of limitations in the same manner as any person; provided, however, that statute of limitations concerning the enforcement of the lien of a judgment shall apply to the Commonwealth."

These accounts accrued while RPI was a part of the College of William and Mary, which, as provided in § 23-39, is a corporation operated for educational
purposes. Furthermore, under § 23-49.2 of the Code, RPI is a corporation operated for educational purposes.

Reference was made in the letter from Dr. Oliver to § 8-779 of the Code. This section, in my opinion, is not applicable, inasmuch as that section refers to claims which have been standing on the books of the Comptroller for not less than two years, and not to claims of this nature.

I suggest that perhaps the executive officers of RPI and other similar State agencies might be reluctant to charge off accounts of this nature without submitting them to the Board of Visitors for consideration. The Board, of course, could pass a resolution authorizing the President to charge off such delinquent accounts whenever it appears, in the judgment of the President, that the accounts are not collectible.

Dr. Oliver does not state whether or not the Institute received notes for any of these accounts or whether any of the accounts were reduced to judgment. In such event, such claims might not now be barred by the statute of limitations.

STATE INSTITUTIONS—Division of Industrial Development and Planning—May perform functions previously performed by Department of Conservation and Economic Development.

INDUSTRIAL DEVELOPMENT—Division of Industrial Development and Planning—Functions.

HONORABLE JOSEPH G. HAMRICK
Director, Division of Industrial Development and Planning

November 14, 1962

This will acknowledge receipt of your letter of November 7, 1962, pertaining to the Division of Industrial Development and Planning. You state that some question has been raised by the federal representatives as to the statutory authority of this Division to act as the “State Planning Agency” in receiving and administering federal grants for local planning activities.

The Division of Industrial Development and Planning was taken out of the Department of Conservation and Economic Development at the recent session of the General Assembly in order to carry out the recommendations of the Governor as set forth in his address to the General Assembly on January 15, 1962 (Senate Document No. 3-A). An examination of the Governor’s speech shows clearly that it was his intention to take personal charge of the functions of the Industrial Division program then being administered by the Department of Conservation and Economic Development. The legislation pertaining to this matter was enacted by three separate bills which are now Chapters 354, 355 and 356 of the Acts of Assembly of 1962. Chapter 275 of the Acts of Assembly added a new section to the Code, known as § 10-125.1, which reads as follows:

“The Director, with the approval of the Board, is authorized to fix and collect charges for planning services rendered counties, cities, and towns, by the Division of Industrial Development and Planning. All such funds so collected shall be paid into the general fund of the State treasury; provided, however, that any such charges made for maps, photographs, plats or other prints or copies shall be based upon the actual cost of materials only used in producing the same, and the funds received therefrom shall be deposited in the State treasury to the credit of the Department and may be expended for the replacement of such materials so used.”

All of the provisions of this new section of the Code are applicable to the Division of Industrial Development and Planning. The Governor’s powers, how-
ever, are more extensive than expressly mentioned in the statutes. In other words, the powers mentioned are not intended to constitute a limitation upon the authority that may be exercised by the Governor. All of the funds heretofore allocated and appropriated to the Department of Conservation and Economic Development to be used in connection with this industrial program were transferred to the Governor's office and his control over the expenditure of these funds is not restricted but, pursuant to the last sentence of Chapter 356 (§ 2-57.01 of the Code), the Governor is given absolute and unrestricted control over such expenditures.

At the 1962 session of the General Assembly the statutes relating to planning, subdivision of land and zoning were re-written and now are contained in Chapter 28 of the Code, consisting of §§ 15-961 through 15-961.3.

Section 15-961.1 provides as follows:

"The planning commission of any region, county or municipality may cooperate with other planning commissions or legislative and administrative bodies and officials of other regions, counties, and municipalities within or without such areas, so as to coordinate the planning and development of such region, county or municipality with the plans of such other regions, counties, or municipalities. Such commissions may appoint such committees and may adopt such rules as needed to effect such cooperation. Such planning commissions may also cooperate with the State Department of Conservation and Economic Development and use advice and information furnished by such Department and by other State and federal officials, departments and agencies. Such departments and agencies having information, maps and data pertinent to the planning and development of such region, county or municipality may make the same available for the use of such planning commissions."

This section, you will note, provides for cooperation between the State agencies and the localities with respect to planning activities and it expressly authorizes the localities to cooperate with the Department of Conservation and Economic Development and use advice and information furnished by such Department and by other State departments and agencies.

The last sentence of this section expressly authorizes such other State departments and agencies (which, of course, includes the Division of Industrial Development and Planning) having information, maps and data pertinent to the planning and development of any locality or group of localities to make such information, maps and data available for the use of local and regional planning commissions.

In your letter of November 7, you review the statutes pertaining to the subject matter and request my opinion as to whether the Division of Industrial Development and Planning of the Governor's office is the State planning agency as contemplated in Section 701 of the Housing Act of 1953, as amended.

The pertinent provision of Section 701 is as follows:

"Sec. 701. (a) In order to assist State and local governments in solving planning problems resulting from increasing concentration of population in metropolitan and other urban areas, including smaller communities, to facilitate comprehensive planning for urban development by State and local governments on a continuing basis, and to encourage State and local governments to establish and develop planning staffs, the Administrator is authorized to make planning grants to . . . .

"(1) State planning agencies, or (in States where no such planning agency exists) to agencies or instrumentalities of State government designated by the Governor of the State and acceptable to the Administrator as capable of carrying out the planning functions con-
templated by this section, for the provision of planning assistance to (A) cities, other municipalities, and counties having a population of less than 50,000 according to the latest decennial census, (B) any group of adjacent communities, either incorporated or unincorporated, having a total population of less than 50,000 according to the latest decennial census and having common or related urban planning problems resulting from rapid urbanization, and (C) cities, other municipalities, and counties referred to in paragraph (3) of this subsection and areas referred to in paragraph (4) of this subsection;”

The Division of Industrial Development and Planning as established in the Governor's office by the legislative enactments referred to herein is, in my opinion, a State Planning Agency as contemplated by the federal statute.

Sections 10-124 and 10-125 of the Code relating to the authority and duties of the Director of Conservation and Economic Development were repealed by Chapter 355, due to the fact that the administration of the Division of Industrial Development and Planning was being transferred to the Governor. No doubt the General Assembly felt that since this Division was being transferred to the Governor, to be administered under his direction, these sections were no longer required. Under the language of the statute transferring this Division to the Governor he is charged with the responsibility of carrying out all phases of the State's program in the field of industrial development, including the formulation, promulgation and advancement of programs throughout the State for the purpose of encouraging the location of new industries in the State and the expansion of existing industries; in general, to encourage, stimulate, and support the industrial development and expansion of the economy of the State.

Under this and related statutes, the Governor may perform all of the functions mentioned in §§ 10-124 and 10-125, which were repealed, and such other functions deemed by him to be necessary for the carrying out of the State planning program.

STATE INSTITUTIONS—Insurance—Saving in premium effected by Bureau of Property, Records and Insurance must be paid into State Insurance Reserve Trust Fund.

HONORABLE C. W. CLEATON
Chairman, Insurance Advisory Board

July 10, 1962

On June 28, 1962, the Insurance Advisory Board requested my views regarding three questions which have arisen in the administration of Chapter 178, Acts of Assembly, 1962, which added Article 3 to Chapter 8 of Title 2, of the Code of Virginia. All questions relate to the required payments by State agencies into the State Insurance Reserve Trust Fund. By virtue of § 2-77.10(c) of the Code (a portion of Article 3, Chapter 8, Title 2), prior to the expiration of any insurance policy on State-owned property, the Bureau of Property, Records and Insurance determines the amount of saving which can be effected in the insurance coverage. This saving must be paid into the State Insurance Reserve Trust Fund.

I have been advised that as of June 28, 1962, the Bureau had devised a program of insurance which will save approximately $43,700.00 in insurance premiums.

Due to the provision in the Appropriation Act, by which unexpended monies revert to the General Fund, the first inquiry is whether the saving thus realized must now be paid into the Trust Fund, as provided in § 2-77.12 of the Code. I am of the opinion that the reversionary provision in the Appropriation Act has no application to funds which are to be paid into the Insurance Reserve
Trust Fund. Chapter 178, Acts of 1962, became effective on June 29, 1962. At that time every agency which had been notified by the Bureau of any saving effected under the formula set out in § 2-77.10 of the Code became obligated to pay that sum into the Trust Fund. The reversionary provision in the Appropriation Act applies to appropriated funds which were unexpended on the last day of the biennium, which in this instance was June 30, 1962.

I have been advised that many of the State agencies have already been informed of the reduced premiums to be paid for insurance coverage and, accordingly, have budgeted that reduced amount for next year's operating expense. The second inquiry thus presented is whether after July 1, 1962, agencies not having budgeted the larger amount for insurance premiums for the fiscal year 1962-1963 could be required to pay the amount of the saving into the Trust Fund and, if so, from what fund would it be drawn?

I am of the opinion that this question must be answered in the negative. Agencies having budgeted a sum sufficient to pay premiums at the prior rate must pay any saving realized from a reduced premium into the Trust Fund. If no such larger amount was budgeted, there will be no fund from which any payment may be made into the Trust Fund.

Closely related is the final inquiry pertaining to the obligation upon the agencies to continue budgeting for insurance coverage at the rate being paid prior to the time of receiving notice of the reduced premiums.

I can find no provision in Chapter 178, Acts of 1962, which would require the agencies concerned to budget a sum greater than that required for carrying insurance at the reduced premiums. The saving is based on a formula which equates existing cost with the cost effected by the Bureau in the renewal of insurance coverage. We can thus assume that each agency carries a sum sufficient in the current budget to pay the cost of renewing the insurance coverage at the prior premium. After being advised of the reduced premium, we may assume that the agency will pay the amount thus saved into the Trust Fund and thereafter budget the amount of the reduced premium.

Under such circumstances, I do not believe the agencies would be required to pay any sum into the Trust Fund after the initial payment. I cannot find any provision in this Act that would require the payment of any sum over the amount budgeted for insurance after the premiums are reduced; neither is there an obligation to budget at a rate greater than the amount which the Bureau advises is the cost of the reduced insurance coverage.

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STATE INSTITUTIONS—Real Estate—Easements—State responsible for damage caused to sewer line equipment in easement through State-owned lands.

HONORABLE L. M. KUHN
Director of the Budget

December 28, 1962

This is to acknowledge receipt of your letter of December 11, 1962, in which you state in part:

"The University of Virginia is presently expanding its campus to an area known as Copeley Hill. This area lies west of U.S. Route 29 and north of the Chesapeake and Ohio Railway tracks. In developing the site for the proposed new field house, considerable fill material will be placed over a sewer line which is owned by the City of Charlottesville.

"Under date of September 11, 1930, an easement was granted to the City of Charlottesville to place the above-mentioned sewer in its present location. It has been recommended by the engineers that this
sewer line be replaced with cast-iron pipe in lieu of the terra-cotta pipe which is presently installed, due to the extensive fill which will be placed over the line. If the line is to be replaced, the City of Charlottesville would like to have the line increased from 12 inches in diameter to 15 inches in diameter, and in so doing the City has agreed to pay the increase in cost from a 12 inch pipe to a 15 inch pipe.

"We should like to have your opinion as to whether the Commonwealth of Virginia has any responsibility for the replacement of this line due to the fact that it is contemplated that some fill material will be placed over the present location."

I have reviewed the correspondence and data which you enclosed. From the facts presented, there is no question that the areas known as Copeley and Copeley Park, which are referred to in the contract dated September 11, 1930, between Roy E. Massey, Executrix, et al., and the City of Charlottesville and recorded in Deed Book 210, p. 104, in the Clerk's Office of Albemarle County, impresses those areas with an easement to lay, construct and maintain a sewer line thereon, and the same has, in fact, been built by the City of Charlottesville.

I can add but little to the excellent memorandum of law prepared by Mr. Lloyd T. Smith, Jr., of the law firm of Battle, Neal, Harris, Minor and Williams, except to state that I concur therein.

The general rule is that where one has an easement in another's land, he must be allowed to enjoy it in such a manner as will secure him all the advantages contemplated by the grant, and the extent of the servitude is determined by the terms of the grant. 6 M.J. Easements: Section 24. The owner of a servient tract (University of Virginia in this instance) may take use of the land which does not interfere with the enjoyment of the easement. 6 M.J. Easements: Section 25.

It is, therefore, my opinion that the Commonwealth of Virginia, acting through the University of Virginia, has the responsibility to replace this sewer line with material (such as cast-iron pipes) which will not be damaged by the extensive fill to be placed over the existing sewer line, if an engineering study discloses that the present terra cotta pipes constituting the sewer would be damaged by the erection of such a fill. It will be in order for the Commonwealth of Virginia (University of Virginia) to enter into an agreement with the City of Charlottesville so that this matter may be resolved.

STATE INSTITUTIONS—Richmond Professional Institute—Relationship to Citizens' Foundation of the Richmond Professional Institute, Incorporated.

Joseph C. Carter, Jr., Esquire
Secretary of the Board of Visitors, Richmond Professional Institute

May 29, 1963

In your letter to me of May 10, 1963, you forwarded a memorandum relating to the relationship between Richmond Professional Institute and the Citizen's Foundation of The Richmond Professional Institute Incorporated, together with proposed restated articles of incorporation and by-laws of the latter.

It appears from this material that the institution now known as Richmond Professional Institute was originally owned and operated by a non-stock educational corporation named Richmond School of Social Economy, Incorporated. This corporation is still in existence and its present name is the Foundation. After the College of William and Mary took over operation of Richmond Professional Institute in 1925, the Foundation devoted its efforts to raising money,
acquiring properties and assisting generally in the development of the Institute, but much of the real estate on which the Institute conducted its operations remained of record in the name of the Foundation.

In 1941, the Foundation and the College of William and Mary executed an agreement under which the former agreed, upon request, to convey to the College all its property of every kind then owned or thereafter acquired, provided that the property was not to be conveyed until the indebtedness of the Foundation was fully discharged or assumed. In 1944, the College agreed to pay the Foundation $15,000 a year rent for the properties owned by it. In 1958, the College further agreed to continue the annual rental payment of $15,000 until the aggregate sum of $321,697 had been paid, but on condition that the Foundation convey to the Commonwealth all properties owned by it that were used for teaching purposes except certain specified properties.

The conveyance was never made in full. The annual payments have continued so that now $270,000 has been paid.


The Institute and the Foundation now propose that the latter convey to the former approximately twelve parcels of real estate (retaining three parcels) in consideration of the continued payment by the Institute to the Foundation of $15,000 a year until $31,697 is paid. In addition, it is proposed that the articles of incorporation and by-laws of the Foundation will be restated in accordance with drafts that you submitted to me.

I am of the opinion that the Board of Visitors of the Institute is empowered by law to commit the Institute to pay to the Foundation $15,000 during each of the next three fiscal years and $6,697 in the fourth fiscal year provided that funds for the purpose are available either by appropriation of the General Assembly or otherwise.

I do not think that the restated articles of incorporation best protect the interests of the Commonwealth and the Foundation in their present form. I suggest that there be added to paragraph numbered 2 in the draft that you submitted to me the following sentence:

"Upon request of the Board of Visitors of Richmond Professional Institute, the Corporation shall convey all real estate owned by it to the Commonwealth of Virginia for the use of Richmond Professional Institute."

As so amended, the restated articles of incorporation are acceptable to me, and the restated by-laws are acceptable to me in the form submitted by you.

STATE SEAL—Use of Facsimile—Not prohibited on badges of private security guards.

HONORABLE MARTHA BELL CONWAY
Secretary of the Commonwealth

This is in reply to your letter of April 12, 1963, in which you request my opinion as to whether the State seal may be used on the badges of guards employed by a private security service.

You are referred to an opinion of my predecessor in office addressed to you, under date of May 29, 1959, in which permissible use of the State seal, or any integral part of the State flag was discussed. I concur with the views expressed in that letter.

Consistent with the views previously expressed, I am of the opinion that
the use of a facsimile of the State seal on the badges of the uniformed guards in question is not prohibited by Article 2, Chapter 8, Title 18.1 of the Code.

STERILIZATION—Mentally Deficient—When mental disease must be hereditary.

MENTALLY ILL—Sterilization—Mental illness must be hereditary.

HONORABLE HAROLD H. DERVISHIAN
Member, House of Delegates

January 23, 1963

This is in reply to your letter of January 21, 1963, in which you request my advice as to whether under § 32-424 of the Code it is required that mental deficiency be determined to be hereditary before a court can enter an order authorizing an operation pursuant to said section. This section reads as follows:

"Any such physician or surgeon may perform a vasectomy or salpingectomy upon any person under the age of twenty-one years, provided that the circuit court of the county or the corporation court of the city wherein such minor resides, upon petition of the parent or parents, if they be living, or the committee, guardian, or next friend of such minor, shall determine that the operation is in the best interest of such minor and society; and further that said infant is afflicted with any hereditary form of mental illness that is recurrent, mental deficiency or epilepsy, and shall enter an order authorizing the physician or surgeon to perform such operation. In any such proceeding, the infant shall be made a party defendant and served with process, a discreet and competent attorney at law shall be appointed as guardian ad litem for such infant to faithfully represent and protect its interest, and to otherwise comply with the provisions of § 8-88 of the Code of Virginia."

In my opinion, the term hereditary relates to mental illness that is recurring, or mental deficiency or epilepsy. The object of the statute is to prevent hereditary impairments of this nature from being transmitted to another generation. If the mental deficiency is not hereditary there can be no purpose for performing the operation under this statute, which must be strictly construed to protect the infant. In construing Chapter 9 of Title 37 relating to sterilization of inmates of mental hospitals, our Supreme Court recognized that the object of legislation of this nature is to promote the welfare and prevent the procreation by those who are mentally ill and would bring into life children who would be similarly afflicted. The Supreme Court of the United States upheld the statute on similar grounds. See Buck v. Bell, 143 Va. 310; 71 L Ed 1000.

The constitutionality of the present statute might be in question if the statute should be administered so as to require the operation in question of infants who have not been found to be afflicted with a mental disease that is inheritable.

In my opinion, before an operation may be made upon an infant under the statute in question, the Court must make a finding that the infant is afflicted with one of the three mental disorders mentioned in the statute and that the disease is hereditary.
STERILIZATION—Vasectomy or Salpingectomy—Explanation to be given by physician performing operation.

PHYSICIANS AND SURGEONS—Sterilization—Operation must be explained by physician or surgeon performing vasectomy or salpingectomy.

October 22, 1962

HONORABLE MACK I. SHANHOLTZ
State Health Commissioner

This is in reply to your letter of October 17, 1962, in which you ask to be advised if § 32-423 of the Code of Virginia (1950), as amended, contemplates the explanation as to the meaning and consequences of the performance of a vasectomy or salpingectomy is to be given by the physician or surgeon who performs such operation.

Section 32-423 of the Code reads, in part as follows:

"It shall be lawful for any physician or surgeon licensed by this State and acting in collaboration or consultation with at least one or more physicians or surgeons so licensed, when so requested by any person twenty-one years of age or over to perform, in a licensed hospital, upon such person a vasectomy or salpingectomy, as the case may be, provided a request in writing is made by such person and by his or her spouse, if there be one, at least thirty days prior to the performance of such surgical operation, and provided, further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation." (Italics added)

From the language which I have emphasized, you will note that the full and reasonable medical explanation must be given by the physician or surgeon who is to perform the operation.

STERILIZATION—Vasectomy and Salpingectomy—to be performed in licensed hospital.

May 2, 1963

HONORABLE THOMAS D. JORDAN
Administrative Assistant, Department of Health

This will acknowledge receipt of your letter of April 30, 1963, enclosing a letter to Dr. Geoffrey T. Mann, Chief Medical Examiner, from Dr. J. G. Jantz of Bedford, in which he requests advice as to whether or not an operation for vasectomy must be performed in a licensed hospital. The authority to perform operations upon request of a person twenty-one years of age or over is contained in Chapter 27, Title 32 of the Code. The same statute also pertains to operations for salpingectomy and to operations of like nature upon infants.

The statute in question is applicable only where the operations are performed upon request and not in cases where it is necessary to perform such an operation for sound therapeutic reasons, or pursuant to the provisions of Chapter 9 of Title 37 of the Code. Therefore, the provisions of Chapter 27, Title 32 (Code §§ 32-423 through 32-427) must be complied with strictly. The statutes under consideration specifically provide that operations performed thereunder shall be performed in a "licensed hospital" which is defined, for the purposes of said Chapter, as "a hospital duly licensed by the State Board of Health, as a general hospital providing facilities for surgical care." The question presented by Dr. Jantz is answered in the affirmative.
Section 32-426 indicates that this statute is for the protection of physicians who are requested to perform such operations. This section giving immunity to physicians for civil and criminal liability (subject to the rules of law applicable generally to negligence) would not, in my opinion, operate to the benefit of any physician who has failed to comply strictly with the provisions of the statute.

SUBDIVISIONS—Recordation of Plats—When prohibited.

RECORDATION—Subdivision Plats—When recordation prohibited.

November 14, 1962

HONORABLE LUCY A. ALLEN
Clerk, Circuit Court of Clarke County

This is in reply to your letter of November 9, 1962, which reads as follows:

"The Board of Supervisors of Clarke County adopted on 8-19-1957 a Sub-Division Ordinance, a copy of which is enclosed. I do not find that this ordinance undertakes to prohibit the clerk from recording any plat or instrument presented under the provisions of Section 55-106 of the 1950 Code of Virginia as amended, and I am now being directed by the Board of Supervisors to refuse to record plats and writings which do not conform to the provisions of the Clarke County Sub-Division Ordinance of 8-19-1957.

"Please advise whether it is proper for the Clerk to refuse to record a writing which complies with Section 55-106 of the Virginia Code as amended, but which does not comply with the provisions of the Clarke County Sub-Division Ordinance of 8-19-1957."

While the subdivision ordinance adopted by the governing body of Clarke County may not undertake to prohibit the recordation of plats or instruments which are presented to the Clerk, in accordance with § 55-106 of the Code, such prohibition is clear by virtue of § 15-967.8 of the Code of Virginia. That section reads as follows:

"After the adoption of a subdivision ordinance in accordance with this chapter, the following provisions shall be effective in the territory to which such ordinance applies:

"(a) No person shall subdivide land without making and recording a plat of such subdivision and without fully complying with the provisions of this article and of such ordinance.

"(b) No such plat of any subdivision shall be recorded unless and until it shall have been submitted to and approved by the local commission or by the governing body or its duly authorized agent, of the county or municipality wherein the land to be subdivided is located; or by the commissions, governing bodies or agents, as the case may be, of each county or municipality having a subdivision ordinance, in which any part of the land lies.

"(e) No clerk of any court shall file or record a plat of a subdivision required by this article to be recorded until such plat has been approved as required herein; and the penalties provided by § 17-59 shall apply to any failure to comply with the provisions of this subsection."
SUBDIVISIONS—Town Ordinance—Must be uniform, even though effective beyond corporate limits.

TOWNS—Ordinances—Subdivision ordinance must be uniform.

April 29, 1963

This is in reply to your letter of April 18, 1963, in which you enclosed a letter addressed to you by Hon. R. William Arthur, Town Attorney for the Town of Wytheville. You and Mr. Arthur have requested my opinion regarding the legal authority for the governing body of the Town of Wytheville to adopt an ordinance for the subdivision of land which will contain regulations which are more lenient in the area two miles beyond the corporate limits of the Town of Wytheville than the regulations applicable within the corporate limits.

The statutory provisions relating to the adoption of subdivision ordinances by the localities are codified as Article 7, Chapter 28, Title 15, Code of Virginia (1950), as amended. The authority for applying such an ordinance enacted by municipalities beyond the corporate limits is set forth in § 15-967.2 of the Code. These provisions in Article 7 should be read in conjunction with all sections in Chapter 28 which provides for the planning and orderly development of the counties and municipalities of the State. The adoption of a subdivision ordinance is only one stage of the development of the comprehensive plan contemplated by Article 4 of this chapter.

I am aware of no provision in this chapter which would authorize the adoption of a subdivision ordinance that contains standards and regulations which differ from those to be applied throughout the area under the jurisdiction of the governing body adopting the ordinance. As a general rule, any ordinance adopted by the governing body to effectuate orderly development of the territory within its jurisdiction must be uniform in its application to the territory within the area affected. See, Board of Supervisors, v. Carper, 200 Va. 653.

The requirement for uniformity is expressly set forth in § 15-968.2 (a portion of Article 8, Chapter 28) which pertains to zoning ordinances, but that article also provides for the division of the territory into districts and the regulation of the districts separately. Section 15-968.2 of the Code reads as follows:

"All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts."

There is no comparable provision in Article 7 of Chapter 28 which pertains to the subdivision of lands. Had the General Assembly intended to provide for the application of different subdivision regulations in various portions of the territory under the jurisdiction of the governing body adopting such an ordinance, it would have been a simple matter to have inserted such a provision in Article 7 of Chapter 28. It is possible for a different set of regulations to be applicable to some areas of the territory within the jurisdiction of a municipality, but only when such areas lie beyond the corporate limits of the municipality and the county governing body has also adopted a subdivision ordinance. In such event, it is necessary for the two governing bodies to determine which regulations are to apply within the area outside the corporate limits but within the municipal jurisdiction as defined in § 15-967.2 of the Code. In case of disagreement, the circuit court determines which regulations are to be applied to such area, pursuant to § 15-967.4 of the Code.

In view of the foregoing, I am of the opinion that the Town of Wytheville has no authority to adopt a subdivision control ordinance which provides regulations which are more lenient to the territory beyond the corporate limits of the municipality than they are within the corporate limits. If such a distinction
is to be made, it will be necessary for the governing body of the County of Wythe to adopt an ordinance containing the desired regulations, and for the two governing bodies to agree that such regulations are to be applied within the area two miles beyond the corporate limits of the Town of Wytheville.

TAXATION—Antique Dealers—Subject to license requirement although sold at antique show sponsored by charitable organization.

HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney for Fairfax County

August 14, 1962

This is in reply to your letter of August 2, 1962, in which you ask to be advised as to whether antique dealers may participate in antique shows sponsored by charitable organizations which are tax exempt without paying the license tax imposed by § 58-381 of the Code of Virginia.

You advise that the antique shows are organized and conducted by the various local organizations inviting antique dealers from within and without the State to take a space in the show, exhibiting whatever antiques the dealer desires to show and the dealer is allowed to sell his antiques to persons visiting the show. The local club makes arrangements for the building or space within a building to hold the show and charges each antique dealer for his space. The club usually collects an admission charge and receives other income from advertising and the sale of food during the show, each show usually lasts from several days to a week.

From the foregoing explanation, I believe it fairly manifest that each dealer exhibits and sells his own wares in a place provided by the sponsor of the antique show. I assume that any profits from sales go to the dealer rather than the sponsoring club. I believe § 54-809 et seq., of the Code applies, and, under such circumstances, I do not believe the participating dealers could be exempted from the license tax imposed under § 58-381 of the Code of Virginia.

TAXATION—Antique Dealers—When license required.

HONORABLE G. A. CALLAHAN
Commissioner of the Revenue for Alexandria

September 17, 1962

I have given careful consideration to your letter of September 10, 1962, relating to the license requirement of antique dealers who participate as exhibitors at antique sales sponsored by such organizations as the D. A. R.

You are already familiar with my views as expressed in my letter of August 14, 1962, addressed to the Honorable Robert C. Fitzgerald in this regard. For that reason, I will not reiterate what was said in that letter, other than to emphasize the necessity for a license so long as the antiques are sold at the place where the antique show is held. As you fully realize, the crucial point which requires either a peddler's license or an itinerant license is the making of the sale and delivering the merchandise. So long as the antique dealers bring the merchandise to the antique show and consummate a sale and delivery thereof, I see no escape from the license requirement.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Bankruptcy—State taxes not dischargeable.  

BANKRUPTCY—Taxes not Dischargeable—Penalty not considered as tax.

Honorable T. A. Slaughter  
Treasurer of Warren County

February 5, 1963

This will acknowledge receipt of your letter of February 4, 1963, in which you state that on a tax claim due the county by a bankrupt, the Referee in Bankruptcy refused to allow as a preferred claim the 5% penalty of $8.78, which ruling, of course, was proper in view of court decisions holding that the penalty is not a tax enjoying priority under the Bankruptcy Act.

Under Section 35(a) of the Bankruptcy Act, taxes levied by a State are not dischargeable by bankruptcy. However, since the penalty is not considered to be a part of the tax under the Bankruptcy Act it is probably a debt that is discharged by bankruptcy.

Under these circumstances, I am of the opinion that the board of supervisors would have the right to exonerate your office from liability for failure to collect this penalty.

TAXATION—Delinquent—Necessary for Treasurer to obtain judgment before execution.

Honorable W. Francis Binford  
County Judge, Prince George County

February 7, 1963

This is in reply to your letter of February 5, 1963, which reads as follows:

"Mr. David A. Lyon, III, of Prince George County, collects delinquent personal property taxes for many counties in Virginia, as well as for Prince George County. He has handed me the following form and sought my advice as Judge of the County Court, as to whether he, as a delinquent tax collector, can delegate his authority to the Sheriff of the County to use such a form for tax levy without first resorting to the County Court for a Civil Warrant against the delinquent tax payer without first obtaining a judgment."

The form which you enclosed with your letter is in the nature of an execution issued by the treasurer directed to the sheriff. In my opinion, it would be necessary for the treasurer to obtain a judgment and the execution to the sheriff would have to be issued upon the judgment as other executions are issued.

In this connection, I am enclosing copies of three opinions of this office, as follows:

REPORT OF THE ATTORNEY GENERAL

TAXATION—Exemptions—Church land acquired subsequent to January first.

April 16, 1963

HONORABLE VICTOR J. SMITH
Commissioner of the Revenue for Harrisonburg

This is in reply to your letter of April 15, 1963, which reads, in part, as follows:

“A local church which is tax exempt at the present time purchased a parcel of real estate in the immediate vicinity of the church which will be used for church purposes as soon as it is remodeled and repaired.

“The question which presents itself is this: The deed to the purchase was dated and recorded as of April 1, 1963. The attorney handling the transaction has forwarded the Treasurer a check for the taxes prorated to April 1st and requests that the property be removed from the tax rolls as of that date.

“It has always been my understanding that if a property passes to a tax-exempt church or organization during the year, the property went onto the tax exempt rolls the following January 1st, . . .”

You have requested my advice as to the liability for tax upon this property for the year 1963. Under the provisions of § 58-822 of the Code, as amended by Chapter 58 of the Acts of 1960, it is provided that property sold to any church or religious body, which is exempt from taxation by Section 183 of the Constitution, shall be relieved from the payment of taxes on such property for that portion of the year from and after the date upon which the title was vested in such church or religious body. Inasmuch as title passed on April 1, 1963 the person who owned the property on January 1, 1963 is entitled to have his taxes prorated as of April 1. Inasmuch as this person owned the property for one-fourth of the calendar year 1963, he would be subject to the payment of one-fourth of the amount of tax that would have been payable for the entire year.

TAXATION—Exemptions—Church-owned building used for parsonage.

August 22, 1962

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will acknowledge receipt of your letter of August 20, 1962 which reads, in part, as follows:

“The Asbury Methodist Church of Christiansburg, Virginia, in addition to having its church building on its own property, also has a two-story parsonage dwelling. The parsonage dwelling is used by the minister. Part of the parsonage is sometimes rented out and, at this time, there is a little charge made by the Church of $25.00 a month. This amount goes to defray the utilities, such as lights, heat or water that is necessary which covers the expenses of the entire house. There being no using or leasing of the same for profit, it would seem to me that this dwelling would be exempt from taxation.

“Would not this parsonage dwelling on the Church property be also exempt from taxation?”
It would seem from the statement made by you that the dominant purpose for which the parsonage is used is to provide a house for the pastor of the church, and that the occasional revenue derived from rental of rooms in the parsonage is to maintain the building.

I am of the opinion that under these circumstances the property is exempt from taxation under Section 183 of the Constitution. The general rule is that exemptions from taxation under Section 183 of the Constitution must be strictly construed. Our Supreme Court, in the case of Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 591, stated:

"But as the policy of the State has always been to exempt property of the character mentioned and described in section 183 of the Constitution, it should not be construed with the same degree of strictness that applies to provisions making exemptions contrary to the policy of the State, since as to such property exemption is the rule and taxation is the exception." (Emphasis supplied.)

This expression by the Court was reaffirmed in Hanover County v. Trustees, 203 Va. 613.

TAXATION—Exemptions—Church property occupied by sexton—Doubtful.

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney of Rockbridge County

December 14, 1962

This is in reply to your letter of December 12, 1962, which reads as follows:

"Question has been raised by the Board of Supervisors of Rockbridge county whether a dwelling owned by a local church, situate on the church grounds, and occupied by the Sexton of the church, is exempt from real estate tax. In this particular instance the Sexton's sole salary from the rural church is free rental of the dwelling.

"My interpretation of Section 58-12(2) of the 1950 Code of Virginia, as amended, leads me to conclude that it does not exempt such property, however, our Board of Supervisors wanted me to seek your opinion."

Section 58-12(2) of the Code provides that the property mentioned therein shall be exempted from taxation, State and local. Under a strict interpretation of this section, it would seem that the building in question would not come within the scope of this section. However, the Supreme Court of Virginia has recently construed another provision of Section 183 of the Constitution in the case of County of Hanover v. Trustees of Randolph Macon College, 203 Va. 613.

A careful reading of this case justified the conclusion that this section of the Code and the comparable clause of Section 183 of the Constitution should not be construed with the same degree of strictness that applies to other property, since exemption of church-owned property under the Constitution is the rule and the taxation of such property is the exception. The use of the property in this instance is incidental to the care and maintenance of the church property.

In light of this case and the cases cited therein, I think there is grave doubt as to whether or not the property in question is subject to taxation.
TAXATION—Income Tax—Agents of foreign insurance companies—Responsibility of company for payment.

November 29, 1962

HONORABLE C. B. COVINGTON, JR.
Treasurer of the City of Newport News

This is in reply to your letter of November 27, 1962, in which you state that you are having difficulty in collecting State income taxes from the agents, or independent contractors, of several foreign insurance companies doing business in this State. You attached to your letter a photostatic copy of a letter from the general counsel of one of these companies, in which he states that the agents of the company are independent contractors and that the company is never indebted to the agents.

It appears that the agents, when making sale for the company, remit the premium less the agent's commission. You wish to know whether or not the insurance company mentioned in your letter, or any other insurance company doing business in a similar way "can legally ignore a tax lien placed against the commission of its agent even though said agent deducts his commission and remits the balance to the company?"

Under the circumstances existing in this case, in my opinion, there is no responsibility upon the insurance company for the payment of the income tax in question.

TAXATION—Inheritance Tax—Bank stock.

January 24, 1963

HONORABLE WARREN MITCHELL SHAW
Commissioner of Accounts for Henry County

This will acknowledge receipt of your letter of January 22, 1963, in which you request my advice with respect to the following question:

"Mrs. A inherited certain local bank stock and the stock was put in her name. She later changed the stock to Mrs. A and/or Mr. B, husband and wife, and now Mr. B has passed away.

"1. What interest does Mr. B's estate have in the above securities and can the bank issue new stock and put same in the name of Mrs. A, considering the fact that Mr. B made no payments on the stock and can the transfer be made without qualification?

"2. Does and/or, with reference to certain bank stock, have the same meaning as joint tenants with right of survivorship when it comes to the probation of Mr. B's estate?

"3. If, under the following Code Sections: 6-55; 13.1-238; 13.1-435; 64-131.1 and 64-131.2, the bank will not be permitted to change the name of the stock to Mrs. A on the set of above facts and requires a certificate of qualification from the Clerk of said Court, will that stock have to be appraised and qualification tax paid on same. If so, how much of the above stock should be included considering the fact that Mr. B has no interest as far as the purchase of same."

The shares of stock, upon the death of Mr. B, became the property of Mrs. A to the same extent as if she had never had the stock issued in the manner stated by you. Mrs. A becomes entitled to such sole ownership by virtue of the contract made with B and not by reason of the passing of any interest of B in the stock under a will or by virtue of the intestacy of the decedent. The estate of B takes nothing on account of this stock certificate and, therefore, no State tax is involved.
It would be appropriate for the bank, upon the surrender of the outstanding certificate, to issue a new certificate for all the shares to A, thus placing her status the same as it was before the present certificate was issued.

The principle involved here is of the same nature as the one considered by our court in *Deal's Administrator v. Merchants' Bank*, 120 Va. 297. The later cases of *King, Ex v. Merryman*, 196 Va. 844, and *Wrenn v. Daniels*, 200 Va. 419, have not altered the opinion in the *Deal* case.

I am informed that the State Tax Commissioner follows the opinion expressed herein.

**TAXATION—Levies—When special levy may be used for general purposes.**

**COUNTIES—Tax Levies—When special levy may be expended for general purposes.**

*Honorable Robert C. Goad*

Commonwealth's Attorney for Nelson County

April 16, 1963

This is in reply to your letter of April 12, 1963, which reads as follows:

"Nelson County has had the unit levy for several years, under which all taxes go into one fund to be used for general county purposes. In May of 1960, the Board of Supervisors approved the establishment of a twelve grade system in the County Public Schools and pledged the funds necessary to install and maintain such a system and in a resolution to this effect the following was stated: 'It being the intention of this Board to propose an increase in the real estate taxes of 25 cents per $100.00 valuation beginning in 1961, for the sole purpose of accumulating funds for this project, and maintaining the same in the future.' In May of 1961 the tax rate was increased by 25 cents to a total of $3.10 per $100.00 valuation which was levied for general county purposes. The additional money realized from the tax increase of 25 cents in 1961 and 1962 has gone into the general county fund.

"In recent months the Board of Supervisors has decided to build an addition to the County Court House, and the Board would like to use the cash which has accumulated from the 25 cents increase in taxes for the construction of the Court House addition, instead of for building the new rooms at the high school required for the twelve grade system as originally planned, and borrow the money from the Literary Fund to construct the additional school rooms.

"I would appreciate your opinion on whether or not it is lawful for the Board of Supervisors to use the money accumulated from the 25 cent increase in the tax rate for the addition to the County Court House in view of the above language quoted from the resolution of the Board in May, 1960."

In my opinion, the board of supervisors may appropriate the money in question for the purpose set forth in the second paragraph of your letter. It is provided in § 58-839 of the Code as follows:

"The making of a general county levy or the imposition of other taxes or the collection of such levy or taxes shall not constitute an appropriation nor an obligation or duty to appropriate any funds by the board of supervisors or other governing body of any county for any purpose, expenditure or contemplated expenditure. The laying or making of
a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semianually, quarterly, or monthly. There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute. Any funds collected and not expended in any fiscal year shall be carried over to the succeeding fiscal years and shall be available for appropriation for any governmental purposes in those years."

I think it is clear under the provisions of this section that the board of supervisors is not bound by the resolution quoted in the first paragraph of your letter. While the extra money being raised by the twenty-five cents levy was intended to be used for public school purposes, the board of supervisors is not prevented from appropriating this money for any other valid purpose for which general fund monies may be expended.

TAXATION—License—Cigarette vending machines—When localities may impose license tax.

February 27, 1963

HONORABLE WILLIAM H. LOGAN
Commonwealth’s Attorney for Shenandoah County

This is in reply to your letter of February 5, 1963, in which you present a question of license tax liability for the operation of coin-operated cigarette vending machines within the Town of Mt. Jackson. You advise that the town adopted an ordinance in 1953 imposing a $5.00 license tax upon each such machine and that, for several years, an owner of such machines has refused to pay the tax.

Prior to the enactment of Article 12 of Chapter 7, Title 58, Code of Virginia, coin-operated cigarette vending machines were subject to the license tax imposed upon slot machines generally. These provisions are codified in Article 11 of Chapter 7, Title 58 of the Code.

In addition to other license taxes, a retail tobacco license is required of a tobacco merchant under § 58-402 of the Code. For each license there is imposed a $5.00 tax.

By virtue of subsection (5) of § 58-355 (a, portion of Article 11) a tax of $3.00 is imposed for each vending machine operated on premises for which a retail tobacco license has been obtained. A volume tax is imposed on operators of cigarette vending machines by the last paragraph of § 58-359 of the Code.

Section 58-361, Code of Virginia, (a portion of Article 11) authorizes the localities to impose license taxes upon slot machines generally. This the Town of Mt. Jackson apparently did by ordinance in 1953.

In 1960, by enactment of Chapter 59, Acts of Assembly, the last paragraph in § 58-355 of the Code was added. That paragraph reads as follows:
"Regularly licensed retail merchants paying retail merchants license tax on their sales at retail shall not be required to have any separate vending machine license on such coin-operated machines which are located on the premises of their place of business."

Upon enactment of Article 12 of Chapter 7, Title 58 of the Code, merchants placing vending machines were given the election to pay the individual license tax imposed upon each machine under Article 11 or pay the license tax imposed under § 58-362 of the Code. Section 58-366 of the Code expressly provides that the taxes imposed by Article 12 shall be in lieu of any license tax on an individual vending machine. Section 58-368 of the Code provides that Article 12 shall not apply to any vending machines upon which the license tax is paid under § 58-355 of the Code.

By virtue of § 58-367.2 of the Code, the governing body of the several cities, towns and counties may parallel Article 12 and impose local license tax on merchants placing vending machines. Such an ordinance is mandatory, however, as a condition to imposing such a license tax, and the amount of the tax is limited.

In view of the foregoing, I am of the opinion that the license tax imposed by the ordinance adopted by the Town of Mt. Jackson is applicable only in the event the owner of the vending machines pays the individual license tax imposed by Article 11, Chapter 7, Title 58 of the Code (§ 58-355(5)). If, on the other hand, the operator has qualified with the State as a merchant placing vending machines, and pays the tax as such, (Article 12, Chapter 7, Title 58), the individual machine tax is not applicable. It necessarily follows in such instances that the local tax would also be inapplicable. In the event the town should wish to impose a town license tax on such merchants placing vending machines, it will be necessary for the town to adopt an ordinance paralleling Article 12, Chapter 7, Title 58 of the Code, as required by the amendment of 1958 to § 58-367 of the Code.

TAXATION—License—Coin-operated machines—When localities limited to amount assessed by State.

April 23, 1963

HONORABLE GRADY W. DALTON
Member, House of Delegates

This is in reply to your letter of April 19, 1963, which reads as follows:

"A constituent of mine owns a coin-operated laundry at Grundy, Virginia. The Town of Grundy imposes a license tax in an amount greater than charged by the state."

"He would like to know whether or not this is permissible under state law."

The State tax upon coin-operated washing machines is provided for in § 58-355, paragraphs (12) to (16), inclusive. This section appears in Article 11 of Chapter 7 of Title 58 of the Code. Section 58-361 of this article reads as follows:

"In addition to the tax herein imposed, the governing body of any county, city or incorporated town may impose and collect a license tax upon slot machines."

It will be noted that there is no limitation in § 58-361 with respect to the amount of license tax that may be imposed by the locality.
There is a limitation in § 58-367.2 with respect to the imposition of local taxes upon the vending machines mentioned in Article 12 of Chapter 7 of Title 58, but § 58-368, appearing in Article 12, expressly provides:

"This article shall not apply to any vending machine upon which the license tax is paid under the provisions of § 58-355."

Inasmuch as it is expressly provided that Article 12 shall not apply to any vending machine upon which the license tax is paid under the provisions of § 58-355, I am of the opinion that § 58-361 controls and that no limitation is provided as to the amount of tax that may be imposed by the Town of Grundy, unless there is a specific limitation contained in the charter of said town.

TAXATION—License—Contractors—§ 58-297 interpreted.

October 17, 1962

HONORABLE ARMISTEAD L. BOOTHE
Member, Virginia State Senate

This will acknowledge receipt of your letter of October 15, 1962, in which you request my opinion concerning the interpretation and application of county contractors' license taxes under the following state of facts:

"A structural steel company located in Fairfax County accepted a $120,000.00 contract to supply custom fabricated steel and to erect the same for a building project in Henrico County. The company purchased the steel, fabricated it in Fairfax County, and shipped the finished product to the job site in Henrico County. The steel company hired a subcontractor to do the actual erection at a cost of $15,000.00.

"The steel company did no work 'on or in any building' in Henrico County and moreover never entered the County. Its only connection with the County is its obligation to erect the structural steel, but this job was subcontracted and the subcontractor presumably paid the county license tax.

"Is the steel company within the statutory definition of 'contractor' and hence taxable by Henrico County on that portion of the contract ($105,000.00) allocated for materials or on that portion ($15,000.00) allocated for labor?"

As pointed out in your letter, § 58-297 of the Code provides:

"Any person, firm or corporation: (1) Accepting or offering to accept orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, or other metal or any other building material; * * * Shall be deemed a contractor."

It appears from your statement of the facts that a structural steel company located in Fairfax County accepted a $120,000.00 contract to supply custom fabricated steel and to erect the same for a building project in Henrico County. The company purchased the steel, fabricated it in Fairfax County and shipped the finished product to the job site in Henrico County. The steel company en-
gaged a subcontractor to do the actual erection at a cost to the steel company—the general contractor—of $15,000.

In my opinion, when the steel company involved here accepted a contract to erect the building it thereupon became a contractor—as used in § 58-297—in connection with the project in Henrico County. The company contracted to do work on the building requiring the use of structural steel. I fail to see how the steel company takes itself out of the definition of contractor by subcontracting the erection of the building.

With respect to the latter part of your question, in my opinion the basis for determining the license tax that may be imposed by the county of Henrico is the full contract price of $120,000. Section 58-266.3 of the Code is applicable to the County of Henrico. Section 58-302.1 authorizes any county to impose such a license tax. Prior to the effective date of this section (Chapter 553, Acts of 1962) only those counties included in §§ 58-266.2 and 58-266.3 were authorized to impose such a license tax.

TAXATION—License—Pool rooms—Applicable when business commences operation.

April 23, 1963

HONORABLE S. PAGE HIGGINBOTHAM
Commonwealth's Attorney for Orange County

This is to acknowledge receipt of your letter of April 18, 1963, in which you request my opinion on certain questions arising from the enforcement of § 58-396 of the Code of Virginia (1950) which embraces the licensing of the keepers of billiard and pool rooms. The pertinent portion of § 58-396 of the Code is as follows:

"Any person who shall keep a place wherein there is a table at which billiards or pool are played shall be deemed to keep a billiard room and if any sum is imposed upon the tables kept therein the same shall be on every table in excess of one capable of being used for the purpose, and kept therein, whether used or not. Any person who shall keep a billiard room without a license shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each day he may continue to keep the same"

I shall answer your question seriatim.

"(1) Please advise as to whether or not persons who have billiard or pool tables in their homes or place of business or clubs, and allow people to play free and without compensation, are required to have a license."

Answer: Section 58-267 of the Code of Virginia, (1950), provides that no person shall prosecute any business, et cetera, named in the chapter (Chapter 7, Title 58) without securing a license. The mere fact that a person has a pool table in his home or even at his place of business where he does not prosecute the business of keeping or maintaining a billiard or pool room does not meet the requirements of the State. I am, therefore, of the opinion that under these circumstances such a person would not be required to have a license.

"(2) Also advise as to what time a license is required by one who purchases pool tables and contemplates operating a pool business. Is the license required when the pool tables are placed in the building,
or when they are set up and ready to be used, or when a charge is made for playing?"

Answer: Section 58-251 of the said Code provides that the person shall be in violation of the law when he commences to prosecute any of the businesses which must be licensed under the provisions of the chapter. Under the circumstances you mention, I am of the opinion that a license is required when the pool tables are set up and ready to be used.

"(3) Would a person who purchases two tables on a Thursday and moves them to his building and starts to repair them and by Saturday, two days later, has one table ready and who allows his friends to shoot upon this table free and without compensation and in the nature of allowing them to 'try-out' the table, be required to take out a license on the Saturday before allowing his friends to shoot upon the table, free of charge, where the owner expected to acquire the necessary license the following week before opening for business and charging his customers?"

Answer: Permitting persons to play without charge is an inducement for them to play at other times and an advertisement on the part of the operator for the purpose of obtaining business. From what you state, this person commences to prosecute the business on Saturday as the table is ready for use and is operated on that day, although no compensation is charged. I am, therefore, of the opinion that the license is required from the Saturday mentioned.

TAXATION—License—Pool Rooms—Coin-operated tables.

November 20, 1962

HONORABLE W. R. MOORE
Commissioner of the Revenue for the City of Norfolk

This is in reply to your letter of November 13, 1962, which reads as follows:

"The question has arisen as to whether or not coin-operated pool tables occupy the same status as ordinary pool tables. The coin-operated pool tables to which I refer are identical to regulation pool tables, except that coins are used to release the balls for play, and, further, the coin-operated pool tables may vary from the regulation size of ordinary pool tables.

"I would like to obtain your ruling as to the applicability of the permit and license statutes to establishments with coin-operated pool tables on their premises. I would also appreciate your ruling on whether or not the age limits applied to pool halls would also apply to establishments with coin-operated pool tables on their premises."

The provisions of the Code of Virginia relating to the keeping of a poolroom or billiard room relate to tables at which billiards or pool may be played. The manner in which the game is played or the procedure utilized for paying for the privilege does not alter the fact that the tables are being maintained for the purpose of playing pool or billiards.

The fact that some tables may vary from the size of an ordinary pool table, as well as the fact that coins may be used to release the balls for play, is immaterial in determining whether or not a person is maintaining a place for the playing of pool or billiards.
In view of the foregoing, I am of the opinion that coin-operated pool tables occupy the same status as any other pool table and all provisions of law relating to poolrooms or pool tables are applicable to such coin-operated pool tables.

TAXATION—Personal Property—Authority of localities to eliminate tax.

**Honorable L. H. Irby**
Member, House of Delegates

January 2, 1963

This is in reply to your letter in which you request my advice as to whether the Council of Blackstone may eliminate all personal property tax, including automobile, for the year 1963.

Section 58-829.1 of the Code (Acts of 1958, Chapter 72), lists the household goods and personal effects that may be exempted from taxation by a locality, including towns.

Automobile and other motor vehicles are not included. I do not construe paragraph (8) of this section to include any type of motor vehicle.

TAXATION—Personal Property—Mobile Homes.

**Honorable M. M. Pence**
Director of Finance for County of Albemarle

December 28, 1962

This is in reply to your letter of December 12, 1962, addressed to Mr. Kenneth C. Patty, Assistant Attorney General. Your letter quotes as follows:

"The question has arisen in Albemarle County concerning the assessment of mobile homes (trailers) for tax purposes. Specifically, the following questions have arisen.

1. Under Virginia law, can Albemarle County assess mobile homes as real estate if the mobile home owner also owns the land and certain other conditions are met?

2. Must all mobile homes be assessed as personal property?

3. Can the County use the base cash values set forth in the Official Mobile Home Market Report for the purpose of establishing values for taxation as personal property?

"We would appreciate your opinion in this matter."

Specific provision for the classification of mobile homes for local taxation is found in § 58-829.3, Code of Virginia (1950), as amended, which reads as follows:

"All vehicles without motive power, used or designed to be used as mobile homes or offices or for other means of habitation by any person are hereby defined as separate items of taxation and shall constitute a classification for local taxation separate from other such classifications on tangible personal property provided in this chapter; provided, however, that the rate of assessment and the rate of tax
shall not exceed that applicable to other classes of tangible personal property."

This section was enacted under Chapter 418 of the Acts of the General Assembly of 1960, which also amended § 58-829, Code of Virginia (1950), relating to the classification of tangible personal property, by excepting such mobile homes from paragraph 5 thereof, pertaining to the aggregate value of all motor vehicles. It is conceivable that a mobile home or trailer home may be converted into a stationary home or other means of habitation for persons in such manner and under such circumstances as to cause it to lose its identity as personal property and to become subject to taxation as a part of the real estate. In any such instance, however, it would no longer be a mobile home, which under § 58-829.3, supra, is stated to mean a vehicle, used or designed to be used as a mobile home or office or for other means of habitation by any person. The words "vehicle" and "mobile" show a design for mobility or movement from place to place, as opposed to being stationary or fixed in one location or annexed to the realty. Furthermore, the statute places the mobile home in a separate class of tangible personal property and provides that the rate of assessment and the rate of tax may not exceed that applicable to other classes of tangible personal property. Section 58-851, Code of Virginia (1950), as amended, provides that the taxing authority may impose one rate of levy upon real estate and another rate of levy upon tangible personal property. Section 168 of the Constitution of Virginia requires that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

Answering your first and second questions, it is my opinion, in consideration of the foregoing, that Albemarle County is not authorized by State law to assess mobile homes as real estate but all mobile homes must be assessed as a special class of tangible personal property in accordance with the quoted statute.

In regard to your third question, I shall reserve comment as to the suitability of the County using values set forth in the publication you mention for the purpose of establishing values of mobile homes for taxation as personal property. I find no statutory provision for the use or exclusion of any particular method of establishing values of mobile homes for taxation as personal property. In my opinion, so long as the taxing authority complies with all constitutional and statutory requirements including the uniformity of tax upon the same class of subjects and fixing the rate of assessment and the rate of tax not to exceed that applicable to other classes of tangible personal property, any reasonable and equitable basis would be acceptable.

TAXATION—Personal Property—Motor vehicles owned by Federal employees living within Federal reservations.

MOTOR VEHICLES—Local License—When applicable within Federal areas.

HONORABLE W. D. REAMS, JR.
Commonwealth’s Attorney of Culpeper County

March 18, 1963

This is in reply to your letter of March 8, 1963, regarding the taxability of personal property on Federal areas with reference to private automobiles owned by a superintendent of a National Cemetery or his wife, in which you refer to
a prior opinion of this office and present certain questions in the following por-
tions, which I quote:

"I understand from an opinion of the Attorney General's office in 1950-51 report, pages 278-279 that the personal property of a super-
intendent is exempt from a county personal property tax. From the
tenor of that opinion it would seem that this refers only to such items of personal property as remains on the Federal reservation.

"I would like to know if the Federal employee or his wife would be liable upon the cars owned by them for personal property tax and
county license tax. Is the Federal employee liable for county license plates for his private car and; is the wife liable for county plates for
her car?"

The opinion, to which you refer, states that caretakers for a National Cemetery living on property owned by the United States over which the Federal government has exclusive jurisdiction, are not subject to a personal property tax. A review of the case of Standard Oil Company v. California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775, there cited, and other related cases, discloses no basis for making a distinction between automobiles and other tangible personal property. The principle approved in these cases is that, "A State can not legislate effectively concerning matters beyond her jurisdiction and within territory sub-
ject only to control of the United States." Accordingly, it is my opinion that if a Federal employee and his wife reside upon property over which the United States hold exclusive jurisdiction, neither he nor his wife are liable for personal property tax upon their automobiles.

In the early case of Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, the Supreme Court held that the United States had taken exclusive jurisdiction over the area and that such area ceased to be a part of the State. Shortly thereafter our Supreme Court of Appeals cited this case with approval and expressed a similar view in the case of Foley v. Shriver, 81 Va. 568, decided in 1886. Following these early cases, the more recent Fed-
eral and State cases, similarly, have held that an area over which exclusive jurisdiction has been acquired by the United States is no longer a part of the State and is not subject to the jurisdiction of the State. Upon this basis, several opinions of this office have expressed the view that both the State and counties are without authority to impose an automobile license tax upon residents of such areas. See, Report of the Attorney General (1955-1956), p. 136. It is, therefore, my opinion that, assuming exclusive Federal jurisdiction over the property on which they reside, neither the Federal employee nor his wife is liable for County license taxes or plates on their automobiles.

Under Chapter 3 of Title 7, Code of Virginia (1950), as amended, Sections
7-18, 7-19 and 7-21, however, provision is made for the reservation by the State of concurrent jurisdiction over lands acquired by the United States. For all purposes of taxation of property on such lands over which the State retains con-
current jurisdiction the lands are, by statute, to be deemed a part of the county or city in which located. In such instances, in my opinion, a Federal employee and his wife who reside thereon would be liable both for personal property taxes and the County automobile license tax. Determination as to whether the State retains concurrent jurisdiction over the area or exclusive jurisdiction has been acquired by the United States should be made by examining the record of the transfer of title in the office of the County Clerk.
TAXATION—Personal Property—Owned by resident and located in a town in this State on January 1 and unreported—Subject to assessment by Commissioner of Revenue under § 58-838.

MOTOR VEHICLES—Personal Property—Assessable by Commissioner of the Revenue when unreported by resident of locality—§ 58-838.

November 13, 1962

HONORABLE BLAIR ZIRKLE
Commissioner of Revenue for Shenandoah County

This is in reply to your letter of November 2, 1962, in which you ask that I advise you whether or not you acted properly and within the meaning of the laws of this State by making an assessment for personal property tax against a resident owner for a motor vehicle which he possessed on the first day of January of the taxing year but failed to report in his return of tangible personal property.

You state that the owner disclaims liability for payment of local taxes on the grounds that the motor vehicle was purchased in the State of Pennsylvania where a four per cent sales tax was paid at the time of purchase, that he financed the purchase and licensed the vehicle in that State, and that he is employed there and the motor vehicle is physically located there four nights out of each week. You further exhibit copy of a letter from the Commonwealth of Pennsylvania, Bureau of Motor Vehicles, which advises that a person working in that state during the week and returning to his state of residency on weekends, using his car in going to and from work, is not required to obtain Pennsylvania licenses.

Driving or keeping the motor vehicle without the State for four nights out of each week would not affect the resident owner's tax liability to this State. The situs for assessment of the property was in Virginia, under the given circumstances, and I find nothing in the other facts related which furnish a resident of this State any legal basis for escaping liability for the payment of personal property taxes on his motor vehicle. As I interpret your letter, the motor vehicle was physically located, as provided in § 58-834, Code of Virginia (1950), as amended, or at least constructively so, in the Town of Woodstock, Virginia on the first day of January. Since the taxpayer was a resident of the town and owned and possessed the motor vehicle, he, therefore, was liable for the tax on any such property. Section 58-829, included in Chapter 16, Title 58 of the Code of Virginia specifically mentions motor vehicles as subjects of taxation under the classification of tangible personal property. Section 58-838, Code of Virginia (1950), as amended, likewise found in Chapter 16 of Title 58, reads as follows:

"If any taxpayer liable to file a return of any of the subjects of taxation mentioned in this chapter neglects or refuses to file the same for any year within the time prescribed, the commissioner of the revenue shall, from the best information he can obtain, enter the fair market value of such property and assess the same as if it had been reported to him." (Italics supplied).

Your assessment, therefore, under the circumstances of the taxpayer's failure to report his motor vehicle, appears not only proper but mandatory under the language of the quoted statute.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Personal Property—Wife not liable when property assessed in name of husband.

Honorable M. A. Firebaugh
City Treasurer for City of Harrisonburg

October 31, 1962

This is in reply to your letter of October 17, 1962, in which you request my opinion as to whether a wife may be held liable for the payment of personal property taxes when the property is assessed in the name of the husband only.

I am of the opinion that your inquiry must be answered in the negative. Personal property which is owned separately by a married woman is assessed for purposes of taxation in her name, and she alone is liable for the payment of such taxes. The same is true with respect to personal property assessed in the name of a married man. Unless such persons choose to file a joint return, they are chargeable separately for the payment of taxes on property which they own.

TAXATION—Personal and Real Property—Land and well equipment.

Honorable James E. Peters
Treasurer of Roanoke County

February 8, 1963

This will acknowledge receipt of your letter of February 7, 1963, in which you ask whether or not it is proper to obtain a judgment against a person who owns land and well equipment, sells water to customers living in the area—the judgment to be for personal and real property taxes.

In my opinion, the procedure suggested is authorized under Article IX of Chapter 20 of Title 58 of the Code. You will note that under § 58-1016, the Board of Supervisors would have to direct that such suit be brought.

TAXATION—Real Estate—Condemnation—How amount determined before tax rate established.

Honorable George W. Kemper
Clerk, Circuit Court of Rockingham County

April 5, 1963

This is in reply to your letter of March 21, 1963, which reads as follows:

"In a condemnation proceeding when a court order directs a clerk of the court to pay the pro rata taxes on a specified piece of real estate to the Treasurer of the city or county and disburse the balance to the condemnee, is the Treasurer of said city of county compelled to take such payment as pro rata taxes based on the 'year before' rate and assessment, if the current year rate and assessment has not been established at the time of the court order?"
By virtue of § 58-796, Code of Virginia (1950), the owner of real property as of the first day of January is chargeable with taxes which are levied against that property. Article 5, Chapter 15, Title 58 of the Code provides for a proration of taxes on land acquired by an arm of government, the taxes being abated as of the date title vests in the government. The problem of determining the amount of taxes chargeable against the property taken is essentially one of mathematics when the land taken by government has actually been assessed and the rate fixed by the governing body of the county or city.

In the case presented by you, the title to the land has vested in the condemnor, but the amount of tax for which the condemnee is liable has not yet been ascertained. Under these circumstances, the award cannot be disbursed with full assurance that § 58-870 of the Code is being satisfied. That section reads as follows:

"No decree or order shall be entered by any court of the Commonwealth directing the payment or other distribution of any funds, securities, moneys or other property under its control or under the control or in the hands of any receiver, commissioner or other officer of the court or any executor, administrator, trustee or other fiduciary unless it be made to appear to such court that all taxes and levies upon such funds, securities, moneys or other property have been paid or unless the payment thereof be provided for in such decree or order. No commissioner, executor, administrator, trustee or other fiduciary, receiver, trustee, bank or other person or corporation shall pay out any funds in hand under the order of any court unless a receipt for taxes is produced showing the taxes have been paid, or unless such order shall so state."

I fully appreciate the hardship that could result in those instances in which the tax rate has not been fixed at the time land is taken by condemnation, for it could conceivably require several months to ascertain the tax liability following the condemnation proceeding. Under such conditions, a practice is being followed which would permit the condemnee to be paid the amount of the award after deducting therefrom the estimated amount of taxes due on the land taken. The most logical method of establishing this amount is to rely upon the taxes levied the preceding year. In my opinion, the amount so determined is not binding upon the county or city in which the land is assessed for taxation. The condemnee would continue to be liable for any tax levied over and above the amount withheld or, in the event the rate should be lower than the preceding year, the condemnee would be entitled to a refund of the amount so withheld which is in excess of the actual tax levied against the property taken.

TAXATION—Real Estate—Errors in reassessment—No authority for board of supervisors to petition for correction.

BOARDS OF SUPERVISORS—Authority—Not authorized to file petition on behalf of property owners for correction of mistakes in reassessment.

HONORABLE ROBERT W. ARNOLD, JR.
Commonwealth's Attorney of Sussex County

December 3, 1962

This will acknowledge receipt of your letter of November 26, 1962, in which you state that the real estate in Sussex County was reassessed in 1961 and, as a result, numerous errors appear on the 1962 land book.
You state that the board of supervisors has determined that as the governing body of the county, it has the right to file a petition on behalf of the property owners requesting entry of a proper decree authorizing and directing the proper authorities to correct the 1962 land book, the current tax tickets in the treasurer's office and the records in the office of the commissioner of the revenue.

You request my advice as to whether or not the board of supervisors has authority to act by and on behalf of the citizens affected by such assessments.

I am of the opinion that your question must be answered in the negative. I know of no statute which authorizes the board of supervisors to take such action.

In my opinion, a Board of Equalization could be appointed forthwith under § 58-898 of the Code. This board would have to organize and complete its work before December 31, otherwise the assessments for the year 1962 will, in my opinion, have to remain as they are.

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TAXATION—Real Estate—Partially constructed buildings—How assessed.

HONORABLE CHARLES A. CALLAHAN
Commissioner of the Revenue for City Alexandria

December 14, 1962

This is in reply to your letter of December 6, 1962, which reads as follows:

"The City of Alexandria is reexamining its policy regarding the assessment of partially constructed buildings in the City. At present, such buildings are assessed at their actual value on January 1st of each year, pursuant to Section 58-811 of the Code Virginia (1950), as amended. I understand that by resolution of our City Council this method could be altered, as provided by Section 58-811.1 of the Virginia Code.

"I am writing to ask your opinion as to whether or not Section 58-811.1 would allow an assessment as of January 1st on the actual value as of that date and an additional assessment as of the date of substantial compliance with such additional assessment superseding the original assessment. Or, stated another way, must we elect to assess either as of January 1st or, in the alternative, at the date of substantial compliance, or do the two statutes, 58-811 and 58-811.1 allow for a combination of the two assessments?"

In my opinion, under §§ 58-810 and 58-811, the Commissioner of the Revenue, without resorting to § 58-811.1, may assess a partially completed new building at its actual value as of January 1st.

In the event the governing body of your city adopts the resolution mentioned in § 58-811.1, in my opinion a subsequent assessment may be made. I do not feel that the assessment made as of the first of the year would prevent a subsequent assessment pursuant to § 58-811.1 for the purpose of increasing the assessment to conform to the valuation then existing.

The view expressed above was submitted to the Honorable C. H. Morrissett for his comment, and a copy of his reply is enclosed herewith.

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TAXATION—Real Estate—When lien attaches to interest of remainderman.

May 13, 1963

HONORABLE JOHN R. SNODDY, JR.
Commonwealth’s Attorney for Buckingham County

This is to acknowledge receipt of your letter of May 9, 1963, in which you state in part:

"A parcel of land was left to a life tenant and assessed for taxation in his name. He died and the land went to others, however, the land continued to be assessed in the name of the deceased life tenant and was not occupied by anyone and the remaindermen did not ever come into actual possession. My question is, are the taxes assessed against the land in the name of the deceased life tenant a lien on the land when the remaindermen take possession?"

A life-tenant is liable for the taxes on real estate as long as he lives and therefore the assessment of the tax should be made in his name. Remaindermen are not liable for the taxes assessed during the life of the life-tenant. City of Richmond and others v. McKinney, 194 Va. 427; Ceroli v. Clifton Forge, 192 Va. 118. After the death of the life-tenant, the remaindermen are liable for taxes and also liable for the proportionate part of the taxes assessed during the year the life-tenant died. Section 55-25 of the Code.

From what you state, the taxes were properly assessed against the life-tenant while he lived. This being the situation, the lien for the taxes attached. Your attention is invited to § 58-815 of the Code, which reads as follows:

"No assessment of any real estate, whether heretofore or hereafter made, shall be held to be invalid because of any error, omission or irregularity by the commissioner of the revenue or other assessing officer in charging such real estate on the land book unless it be shown by the person or persons contesting any such assessment that such error, omission or irregularity has operated to the prejudice of his or their rights."

This section was enacted for the purpose of overruling the decision of the Court in the cases of Albemarle v. Massey, 183 Va. 310, and Stark v. Norfolk, 183 Va. 282, the latter case holding that the assessment in the name of the estate of the deceased former owner while the land was owned by the life-tenant did not constitute a lien on the interest of the remaindermen, and the former case holding that since the Commissioner of Revenue had not complied with the statute in assessing the property in the name of the owners, the assessment was invalid.

Apparently, the reason why this property is not properly assessed in the name of the remaindermen is that the Commissioner of Revenue made an error in not doing so. I cannot perceive how the failure of the Commissioner of Revenue to assess the property in the name of the remaindermen after the death of the life-tenant would in any wise prejudice their rights. The burden is on the remaindermen to show that they have been prejudiced by the error or omission of the Commissioner of Revenue. This being the situation, your specific question is answered in the affirmative.
This is in reply to your letter of June 7, 1963, in which you enclosed copy of an equipment lease and present the following question:

"The question pertains to the filing or recording of equipment leases without an option to purchase under Section 55-88 Code of Virginia 1950 as amended. The third paragraph of Section 55-88 Code of Virginia 1950 as amended provides and I quote, 'Provided that any document which on its face purports to be a lease of goods and chattels and which contains an option to purchase by the lessee shall be recorded as a lease regardless of the conditions found in the document and regardless of the true intent and effect of the document.'

"My question is, should an instrument which, on its face, purports to be a lease, without an option to purchase by the lessee, regardless of the conditions found in the document and regardless of the true intent and effect of the document, be filed under Section 55-88 Code of Virginia as amended, or recorded in the General Deed Book as a lease, with the appropriate recordation Taxes, etc., charged under Section 58-58 Code of Virginia 1950 as amended?"

Section 55-88 of the Code was amended by Chapter 435 of the Acts of 1958, so as to add the following paragraph:

"Provided that any document which on its face purports to be a lease of goods and chattels and which contains an option to purchase by the lessee shall be recorded as a lease regardless of the conditions found in the document and regardless of the true intent and effect of the document."

This amendment resulted from two opinions furnished by this office, one of which is dated November 1, 1957 to the Honorable A. T. August, Clerk of the Chancery Court of the City of Richmond, and published in the Report of Attorney General (1957-1958), at p. 39. I do not believe that the other opinion was published, but it is referred to in the opinion to Mr. August. After we had rendered these opinions to Mr. August and Mr. Purdy the legislature amended § 55-88 so as to state that even though an option to purchase is contained in a lease, the document, nevertheless, will be treated as a lease and not a conditional sales contract for the purpose of recordation.

Specifically answering your question, I am of the opinion that the equipment lease which you have submitted should be recorded as a lease and the recordation tax charged as required under § 58-58 of the Code.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Deed of bargain and sale—Vendor’s lien retained—No additional tax.

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This will acknowledge receipt of your letter of August 6, 1962, which reads as follows:

"Over a period of thirty-two years I cannot recall ever having recorded a deed of Bargain and Sale in which a Vendor’s Lien was reserved. It is possible that I might have had one or two during that period of time.

"My question is: Does the recordation tax attach to the consideration for the property sold only, or should a recordation tax be charged both for the consideration of the deed and on the amount of lien that is being reserved in the deed?"

Section 58-54 of the Code of Virginia is applicable. Under this section, the recordation tax on a deed is "fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater." The retention of a vendor’s lien by the grantor to secure the payment of any balance due by the grantee upon the purchase price conforms to § 55-53 of the Code. There is no provision in the Code under which a recordation tax may be charged upon the amount of a lien to secure the deferred purchase price, except in those instances where the purchaser executes a deed of trust or mortgage, in which event the tax on such an instrument is imposed under § 58-55 of the Code. Therefore, no recording tax is proper in a case such as you have presented.

TAXATION—Recordation—No exemption for deed of trust executed by voluntary fire department.

HONORABLE W. E. SANDIDGE, Clerk
Circuit Court of Amherst County

This is in reply to your letter of May 10, 1963, in which you request my opinion as to the liability for a recordation tax on a deed of trust on land owned by the County of Amherst and leased by the Trustees of the Amherst Fire Department, the deed of trust being designed to secure a loan on the building being constructed on the lot.

You did not state the name of the grantee in the deed of trust, but you did enclose a copy of the contract of lease between the Amherst County Board of Supervisors and the Trustees of the Amherst Fire Department, a voluntary non-profit association.

The statutory provisions exempting certain conveyances from the recordation tax imposed by §§ 58-54 and 58-55 of the Code are codified as § 58-64 of the Code. That section reads as follows:

"The taxes imposed by §§ 58-54 and 58-55 shall not apply to any deed conveying real estate to an incorporated college or other incorporated institution of learning, not conducted for profit, where such real estate is intended to be used for educational purposes and not as a source of revenue or profit; nor to any deed conveying real estate to the trustee or trustees of any church or religious body, where such real estate is intended to be used exclusively for religious purposes,
REPORT OF THE ATTORNEY GENERAL

or for the residence of the minister of any such church or religious body; nor to any deed conveying property to the State or to any county, city, town, district or other political subdivision of this State, nor to any deed conveying property to the Virginia Division United Daughters of the Confederacy; nor to any deed conveying property to any nonstock corporation organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit; nor to any deed of trust or mortgage given by an incorporated college or other incorporated institution of learning, not conducted for profit, nor to any deed of trust or mortgage given by the trustee or trustees of a church or religious body; nor to any deed of trust or mortgage given by any nonstock corporation organized exclusively for the purpose of owning and/or operating a hospital or hospitals not for pecuniary profit. The words 'trustee or trustees,' as used in this section, mean the trustees mentioned in § 57-8 and the ecclesiastical officers mentioned in § 57-16."

From the foregoing quoted provisions you will note that no mention is made of voluntary fire departments or similar non-profit associations. Accordingly, I am of the opinion that the deed of trust which has been executed by the Amherst Fire Department is not exempt from the recordation tax imposed by § 58-55 of the Code.

TAXATION—Recordation—Not applicable to instrument substituting one trustee for another.

January 21, 1963

HONORABLE EMELINE A. HALL
Clerk, Circuit Court of Northumberland County

This is in reply to your letter of January 18, 1963, to which is attached a copy of a letter to you which reads, in part, as follows:

"We have been requested to determine the cost involved in recording an instrument substituting State-Planters Bank of Commerce and Trusts in the place and stead of the Central National Bank of Richmond, as Trustee under the Deed of Trust and Mortgage dated March 1, 1959, from Reedville Oil and Guano Company, Incorporated, and others, securing $1,700,000 6% first mortgage notes, which we understand was recorded in your office on April 22, 1959."

You have requested my advice as to whether or not a State recordation tax should be required in connection with this matter.

We have been advised by counsel for the beneficiary under the deed of trust that the original instrument contains a provision authorizing the noteholder to substitute a new trustee for the trustee named in the deed of trust, and that the only purpose of the instrument proposed to be recorded is to exercise that authority. I am not aware of any statute under which an instrument of this nature is subject to a recordation tax. The State collected a recordation tax at the time the deed of trust was admitted to record. The subsequent instrument is not, in my opinion, a contract such as is contemplated by § 58-58 of the Code. Furthermore, it is not a supplemental deed of trust. The instrument under consideration has the same effect as a decree of court entered under Chapter 4, Title 26 of the Code, which is not subject to a recordation tax.

In my opinion the instrument under consideration is not subject to a recordation tax.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Recordation—Option to purchase real estate.

February 4, 1963

HONORABLE J. FULTON AYRES
Clerk of Courts of Accomack County

This will acknowledge receipt of your letter of February 2, 1963, which reads as follows:

"I would like to know the appropriate tax to be paid by a party at the time of recording an option to purchase real estate. The Code mentions contracts, but does not mention options. I would like to know if the tax should be based on the amount paid for the option, or on the amount to be paid for the real estate in the event the option is exercised.

"Some of our attorneys feel that to pay a tax based on the price of the real estate at the time of recording an option and then later pay the same tax at the time of recording the deed to the land in the event the option is exercised, is double taxation. I would greatly appreciate your opinion in this regard."

Section 58-58 of the Code provides, in part, as follows:

"On every contract relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for; . . ."

An option to purchase real estate is unquestionably a contract relating to real property, exercisable at the election of one of the parties, and, therefore, the contract is subject to the tax provided in this Code section.

In my opinion, there is no escape from the conclusion that the statutory recordation tax must be collected.

TAXATION—Recordation—Transfer fee to be charged when real estate transferred by will.

CLERKS—Fees—Collection of transfer fees when land passes by will.

December 12, 1962

HONORABLE RHEA F. MOORE, JR.
Clerk of the Circuit Court of Tazewell County

This is to acknowledge receipt of your letter of December 6, 1962, in which you request my opinion on two questions concerning the imposition and collection of transfer fees. The same will be answered seriatim.

Quoting from your letter in part:

"... we would like to have your opinion as to whether we are correct in charging a transfer fee in all cases when the decedent owns real estate, and when his or her personal representative qualifies as such in this office?"
Section 58-816 of the Code of Virginia (1950) imposes transfer and entry fees, including a fee “for making an entry transferring to one person’s lands before charged to another . . . .” Section 58-817 of said Code provides in part:

“All fees mentioned in the preceding section shall be collected by the clerks of the courts of record of the county and cities at the time of recording the deed or will . . . .” (Italics supplied).

In the case of a decedent dying testate, when there is a qualification and the will is probated, the same is recorded and, therefore, a transfer fee is imposed. When there is no qualification and the will is admitted to record, the transfer fee is likewise imposed. Hence, it is my opinion that in all cases where the decedent dies testate, the clerk should collect the transfer fee imposed by the above statute.

However, in case the decedent dies intestate, the situation is somewhat different. Your attention is invited to § 64-127.1 of the Code of 1950 as amended by Chapter 149, Acts of 1952, which reads as follows:

“Upon the death intestate of a person owning real estate, any person having an interest therein, including a personal representative if a qualification be had, may execute an affidavit, on a form provided by the clerk of the court, setting forth briefly (1) the real estate owned by the decedent at the time of his death situated within the city or county where such affidavit is to be recorded; (2) the intestacy and (3) the names and last known addresses of the heirs at law. The clerk of the court of the county or city in which deeds are admitted to record and in which such real estate or any part thereof is located, shall, upon the payment of the fees provided by law, record and index the same as wills are recorded and indexed. . . .” (Italics supplied).

Reading this together with § 58-817, supra, it is clear that the list of heirs filed with the clerk under the former section should be treated as a deed or will in so far as collecting the fees under the latter statute is concerned. The manifest purpose of this section (64-127.1) is to provide a means by which the Commissioner of the Revenue may be apprised of the change in ownership of real estate so he can make assessments accordingly. It would follow, therefore, that the clerk in cases of a qualification of the estate of a decedent dying intestate should collect the transfer fees under § 58-817 only in those cases where an affidavit is filed with him under § 64-127.1, setting forth therein a list of heirs.

You further state:

“One further question arises in that if this real estate in question is held jointly with right of survivorship, then would it be proper here to charge the transfer fee since a transfer fee was charged to the persons when their deed was recorded.”

In such instance, there is no transfer of ownership. The Commissioner of the Revenue merely deletes the decedent’s name from the entry upon the land books. It is true that the Commissioner of the Revenue is not put on notice of the death of the joint owner and no change is made in the assessment until such information is forthcoming. However, this does not warrant the imposition of the transfer fee. I am of the opinion that no transfer fee should be collected by the clerk in such cases.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Utility Taxes—When assessed against consumers.

CITIES—Utility Taxes—Not to be assessed against insurance companies.

Honorable Earl F. Wagner
Commonwealth’s Attorney for City of Alexandria

August 14, 1962

This will acknowledge receipt of your letter of August 10, 1962, in which you refer to § 58-500 of the Code of Virginia, and present the following facts and question:

“In the City of Alexandria, there is a tax very similar to taxes imposed by many other cities of the first class throughout the Commonwealth that is imposed on the consumption of utility services, levied on the consumer and collected by the utility companies. There is also a local tax imposed on the business of renting houses and apartments that is measured by gross receipts. One of the major consumers of the utility services is a large apartment project owned by a life insurance company. This project is also paying the business license tax on renting as mentioned herein. Now, for the first time, the owner of the project has raised the question of possible exemption under the statute quoted above. Specifically, my question is: Does the quoted section of the State Code relieve the insurance company, in its capacity as owner of the apartment project, of the two mentioned taxes; or does that section merely prevent further taxation of the business of operating an insurance company?”

Chapter 4 of the Acts of the General Assembly of 1962 created a commission known as the Commission on State and Local Revenues and Expenditures and Related Matters to make a study of the matters therein set forth. Senate Joint Resolution No. 34 (page 1430, Acts of 1962) requests this Commission “to make a study and report upon, in addition to the other matters under its jurisdiction, the question of whether insurance companies which derive income from the rental of real property owned or held by such companies for the purpose of producing rental income should be subject to any local business privilege license tax imposed on persons engaged in the business of renting property, and what, if any, exemptions should be allowed from the imposition of any such tax upon the gross receipts of any such company from any such property.”

The preamble of this Resolution is as follows:

“Whereas, for many years the license tax on gross premium income and the tax on real estate and tangible personal property held by insurance companies has been in lieu of all other fees and taxes, State, local, or otherwise; and

“Whereas, certain insurance companies are deriving substantial income from the rental of real property, other than the offices of such companies and such property is owned or held by such companies for the purpose of producing rental income; and

“Whereas, certain localities of the State have imposed local business privilege license taxes on persons engaged in the business of renting property, and the insurance companies above referred to have heretofore been exempt from such taxation, with the result that persons similarly situated are subjected to different tax burdens, and it is proper that the Commission to Study State and Local Revenues and Expenditures and Related Matters, heretofore created by Chapter 4 of the Acts of Assembly of nineteen hundred sixty-two, should consider this among the other matters falling within its jurisdiction; * * *”
I understand that unsuccessful efforts were made at the 1960 and 1962 sessions of the General Assembly to amend § 58-500 of the Code so as to remove some of the restrictions placed upon the localities with respect to the imposition of local licenses and levies such as you mention upon insurance companies. The language of the Resolution and the refusal of the General Assembly to adopt the proposed amendment suggest that the interpretation of the present law by the General Assembly is that the taxes in question may not now be collected from insurance companies.

I am unable to find any opinions of this office or any court decisions in direct point. I feel that, pending the report of the Commission, I should refrain from expressing the views of this office beyond those contained herein.

TORTS—Immunity—School board not liable for injuries on school property.

SCHOOLS—School Boards—Immunity from tort liability.

HONORABLE E. W. CHITTUM
Superintendent of Schools for City of Norfolk

January 2, 1963

This is to acknowledge receipt of your letter of December 12, 1962, in which you state in part:

"From time to time our School Board permits the use of school facilities by various civic and church groups. Would our Board and executive officers, by renting or leasing property, be liable for a patron's personal injuries and if so, under what conditions?"

The question you now raise was the subject of Governor Harrison's (then Attorney General) letter to you dated March 3, 1959, Report of the Attorney General (1958-1959) p. 263.

Since the issuance of that opinion the Supreme Court of Appeals has considered a similar question in Kellam v. School Board, 202 Va. 252. This was a suit against the school board for injuries received by the plaintiff when she fell down while walking in an aisle of the auditorium because the aisle way was slippery. The school board had leased the auditorium for a concert and the plaintiff had paid an admission fee to attend. The Court held that the board had authority under §§ 22-164.1 and 22-164.2 to rent the auditorium for such purposes and was immune from liability for the injuries sustained by the plaintiff. In light of this case, I am of the opinion that there would be no liability against the School Board or its members.

I enclose a copy of the opinion in the Kellam case.

TORTS—State Institutions—Immunity.

STATE INSTITUTIONS—Immunity for tort liability.

HONORABLE ROBERT F. BALDWIN
Member, Virginia State Senate

January 7, 1963

This is in reply to your letter of January 4, 1963, in which you state that the State Department of Agriculture proposes to apply an insecticide known as Dieldrin over a substantial area in Norfolk in order to eliminate an infestation
of white fringed beetles. You further state that it is reported that the insecticide is reputed to be very poisonous and could be a great threat to pets, wildlife and, perhaps, even children. You then present the following question:

"The particular question I would like to ask you is this—if a child or a valuable pet were poisoned by this insecticide would there be any liability on the part of the State or its Agents as a result of such poisoning? It is not clear to me whether the State can be sued without its consent in a matter of this kind, and even if it can is the State liable for this type of procedure. If you can enlighten me, I shall appreciate it."

A suit of this nature would, in my opinion, be a suit against the State, and the State has not given its consent, insofar as I am able to determine, to be sued on a claim of this nature. It is well settled that the State is immune from liability for torts. A leading case on the subject is Sayers v. Bullar, 180 Va. 222, in which the Court stated as follows:

"A state cannot be sued except by its permission, and even if the suit, in form, be against the officers and agents of the State, yet if, in effect, it be against the State, it is not maintainable. Sections 2578 to 2583 of the Virginia Code (Michie) provide the only cases and the procedure in which actions may be maintained against the State. There is no statute which gives a right to anyone to sue the State for tort. Commonwealth v. Chilton Malting Co., 154 Va. 28, 152 S. E. 336. See also Digest of Virginia and West Virginia Reports, Vol. 9, pp. 14 and 15, where the cases are collected and digested."

The Code sections numbered 2578 through 2583, referred to in that case, are now §§ 8-752 through 8-757 of the Code.

TOWN—Council—How vacancy filled when person elected does not qualify.

HONORABLE WALThER B. FIDLER
Member, House of Delegates

July 24, 1962

This is in reply to your letter of July 18, 1962, in which you refer to our opinion of June 26, 1962, holding that an employee of the U. S. Naval Weapons Laboratory at Dahlgren, Virginia, who was elected to the council of the town of Colonial Beach at the last June election, would not be eligible to hold the office to which he was elected while continuing in his present employment. You enclosed with your letter copy of a letter to you dated July 16, 1962, from Mr. George Mason, Jr., Town Attorney, in which he requests advice as to how the vacancy—which, it is assumed, will be created on the town council by the failure of Mr. Gallahan, the person who was elected, to qualify for the office—shall be filled.

At present, there is no vacancy in the office of town council. When the new council assumes office on September 1, there will, of course, be a vacancy unless Mr. Gallahan should remove the disqualification and qualify for the office. See Burnett v. Brown, 194 Va. 103. Under § 15-422 of the Code, a person elected to the council is required to qualify by taking the oath on or before the day on which his term of office begins.

There is no provision in the charter of the Town of Colonial Beach pertaining to how such a vacancy may be filled. Therefore, in my opinion, § 15-423 of the Code of Virginia is applicable. Under that section the new council may fill the
vacancy by electing someone from the electors of the town. The first two sentences of this section would not apply in a case where a person who has been elected to a town council creates a vacancy by his failure to qualify for the office.

Mr. Mason suggested in his letter that it might be possible that the next highest receiver of votes in the town election of June 1962 would be considered elected.

With respect to this suggestion, I am of the opinion the answer must be in the negative. Although one of the persons in the group that received sufficient votes to be included among the six highest was not entitled to qualify for the office, he was, nevertheless, on the ballot and was elected. Had his name not been on the ballot, it does not necessarily follow that the person who attained seventh place would have been chosen by the voters for sixth place. If there were more than seven candidates one of those below seventh place might have been selected by a sufficient number of voters to attain the sixth place. Furthermore, the voters could have inserted by the write-in method for sixth place the name of a citizen who had not filed.

The commissioners of election have canvassed the vote and have made their certificate, which shows the result of the election. I know of no procedure under which the commissioners may now review their action and make a new certificate.

TOWNS—No authority to provide office for circuit court judge.

COURTS—Office—Towns not authorized to provide office for circuit judge.

HONORABLE ROBERT W. ARNOLD, JR.  
Commonwealth's Attorney for Sussex County

September 20, 1962

This will acknowledge receipt of your letter of September 18, 1962, which reads as follows:

"Does an incorporated town located within a county composing a part of a Judicial Circuit have the power to appropriate funds for the purpose of providing an office for the Circuit Judge of that Judicial Circuit who resides in the town?

"Is the mayor of an incorporated town, elected by popular vote, eligible to serve as a tie breaker under the provisions of § 15-240 of the Code of Virginia as amended by the 1962 acts of assembly (page 918)?

"Would his appointment and qualifier as tie breaker serve to make it in any way unlawful for such tie breaker to do business with the board of supervisors—and the county in which he serves as such?"

With respect to your first question, there is no general statute which would authorize a town to appropriate public funds for the purpose of providing an office for a judge of a circuit court. This would, in effect, be supplementing the compensation of a State officer whose salaries and allowances are fixed by the appropriation act pursuant to Sections 102 and 103 of the Constitution and Article 4, Chapter 1, Title 14 of the Code.

Unless there is a provision in the town charter authorizing such an expenditure, in my opinion, the town council is not authorized to expend its revenues for the purpose stated in your letter. The situation is similar to the question considered in an opinion issued by this office on August 3, 1948, published in the Report of the Attorney General, (1948-1949), p. 272. I enclose herewith copy of that opinion.
With respect to your second question, § 15-240 provides that "no person shall be appointed or serve as a tie breaker who is not qualified to hold office as supervisor * *." Section 15-486 prohibits a member of a board of supervisors from holding any other office, elective or appointive. A mayor, therefore, may not be a member of the board of supervisors while holding that town office. The object of the amendment by Chapter 595, Acts of 1962, was to assure that the tie breaker would possess all the qualifications of the members of the board of supervisors, since the tie breaker performs the function of a member of the board when acting as tie breaker.

Your third question is answered in the affirmative. The prohibitions of § 15-504 of the Code exist for the purpose of preventing a member of the board of supervisors from having any interest in a contract payable out of the public funds under appropriations made by the board. It is possible that the tie breaker would be called upon to break a tie with respect to the appropriation ordinance of the county. In my opinion, the tie breaker may not contract with the county, or be directly or indirectly interested, in any contract with the county.

TRAILER CAMPS—License Taxes—Must be levied pursuant to State law.

COUNTIES—Trailer Camps—No authority for county to prescribe minimum number of trailer lots.

HONORABLE JAMES CLOPTON KNIBB
Commonwealth’s Attorney for Goochland County

September 18, 1962

This will acknowledge receipt of your letter of September 12, 1962, which reads as follows:

"The Board of Supervisors of Goochland County, under authority of Section 35-62 of the 1950 Code of Virginia as amended, adopted a Trailer Court ordinance effective January 1, 1961. Among other provisions in this ordinance the Board provided for the payment of a license tax which reads as follows:

"SECTION X. 'Any person desiring to engage in the business of operating a trailer camp or park in Goochland County shall before commencing said business obtain a permit from the County Health Officer and shall then take his permit to the office of the County Commissioner of Revenue and there obtain a license to operate said business. The license tax shall be at the rate of $25.00 per trailer lot used, or intended to be used, however no license shall be issued for less than five trailer lots.'

"Question has arisen as to the legality of the provision requiring a license on a minimum of five lots as provided in this ordinance. I shall appreciate your opinion as to the legal effect of this provision."

The authority delegated to the political subdivisions of the State to levy and collect license taxes upon the operation of trailer parks and trailer camps, is found in Article 11, Chapter 6, Title 35 of the Code of Virginia—§§ 35-64.1 through 35-64.8. A "trailer park" or "trailer camp" as used in this Article, means "any site, lot, field or tract of land upon which is located one or more trailers * *." A "trailer lot" is defined as "a unit of land used or intended to be used by one trailer."

Under § 35-64.5, a political subdivision is "authorized to impose an annual license on the operator or owner of any such trailer park or trailer camp of
not less than five dollars nor more than fifty dollars per trailer lot used or intended to be used as such."

The counties have only those powers granted by the State. The authority delegated in these statutes cited does not, in my opinion, extend to permitting the counties to prescribe that the operator of a trailer park or trailer camp shall have not less than five trailer lots subject to the license tax. A "trailer park" or "trailer camp," as used in the definition—§ 35-64.3 of the Code—may consist of a lot on which only one trailer may be located.

I can find nothing in the statutes under consideration which would justify the conclusion that the governing body of a county may enact an ordinance containing a provision of the nature under consideration. In my opinion, that part of Section X of the ordinance which requires a licensee to purchase a license for not less than five trailer lots is not within the scope of the authority granted under the statute.

TRAILER CAMPS—Regulation by Counties.

COUNTIES—Ordinances—Regulation of trailer camps.

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney of Loudoun County

January 3, 1963

This is in reply to your letter of December 28, 1962, in which you enclosed a copy of a Trailer Camp Ordinance adopted by your county on July 6, 1959. You request my advice as to whether or not there is any prohibition against such an ordinance containing (1) regulatory provisions and (2) a license provision.

It was held in Board of Supervisors v. American Trailer Co., 193 Va. 72, that Article 1, Chapter 6, Title 36—Code §§ 35-61 and 35-62—only authorized a county to adopt and enforce an ordinance for the purpose of regulating the operation of trailer camps. The ordinance involved in the above case was held invalid because, as adopted, it contained a revenue provision and the amount of the tax imposed bore no reasonable relation to the expenses incurred in enforcing the ordinance. It was also held in that case that the Act referred to in § 35-64 was void as being special legislation.

A county may adopt a regulatory ordinance under §§ 35-61 and 35-62. It may also impose a tax for revenue purposes under Article 1.1, Chapter 6, Title 35—§§ 35-64.1 to 35-64.6 of the Code, inclusive. This statute was enacted subsequent to the holding in the case appearing in 193 Va., at page 72.

The ordinance involved here, I assume, was enacted in conformity with the requirements of § 15-10 of the Code. If this assumption is correct, in my opinion, § 2-5.10 of the ordinance is enforceable. There is no requirement in § 15-10 that the object of an ordinance shall be expressed in the title. The effective date of the ordinance was fixed at 12:01 A.M., July 7, 1959, and the ordinance was adopted on July 6, 1959. Of course, the ordinance could not be in effect under thirty days from its passage, except in case of an emergency stated in the ordinance, which was not done. However, despite the language of Section 7-1 of the ordinance, I feel that it became effective thirty days after its enactment.

I am not aware of any statute that would prohibit the incorporation of the regulatory provisions and the license provision in the same ordinance. I am not convinced, however, that the case of Flax v. Richmond, 189 Va. 273, is in point.

I find that I wrote to you on March 10, 1961, relative to this ordinance. This letter is published in the Report of the Attorney General (1960-1961), p. 321.
REPORT OF THE ATTORNEY GENERAL

TREASURERS—Deputies—Cannot continue in office when Treasurer’s term ceases.

PUBLIC OFFICERS—Deputies—Tenure of office ceases upon termination of principal’s term.

HONORABLE ROBERT D. HUFFMAN
Clerk of Circuit Court of Page County

September 20, 1962

This will acknowledge receipt of your letter of September 18, 1962, which reads as follows:

"The Treasurer of Page County has recently died and his successor in office is desirous that the Deputy Treasurer be retained. Is it necessary for the new Treasurer to reappoint her or would she continue in office under her former appointment until the end of the former treasurer's term or until her removal for any other cause."

A deputy treasurer is appointed under the provisions of § 15-485 of the Code. This section provides that deputies appointed thereunder "may discharge any of the official duties of their principal during his continuance in office * * *."

I know of no other statutory provision relating to the tenure of office of a deputy.

Generally, a deputy is one who is appointed as the substitute of another and empowered to act for him in his name or on his behalf. Whenever the principal ceases to hold the office, the tenure of the deputies, in my opinion, ends. There can be no deputy without a principal.

Under § 58-918 of the Code, a treasurer may require a bond from his deputy, which bond is in favor of the principal rather than the Commonwealth, because the liability of the deputy is to his principal. This statute, in my judgment, supports the view that the tenure of a deputy cannot continue after his principal ceases to hold the office.

It is the prerogative of the treasurer who was appointed to fill the vacancy to appoint such deputies as the office may require.


TAXATION—Tobacco Act—Authority of State Tax Commissioner.

HONORABLE C. H. MORRISSETT
State Tax Commissioner

April 1, 1963

This is in reply to your letter of March 29, 1963, in which you state that there are certain wholesalers who are alleged to be violating the Virginia Unfair Sales Act and that these wholesalers are holders of permits under the provisions of §§ 58-757.1 through 58-757.27, generally known as the Virginia Tobacco Tax Act. This Act makes no reference whatsoever to the Virginia Unfair Sales Act.

The State Tax Commissioner has authority under the Tobacco Tax Act (§ 58-757.10) to revoke permits under certain circumstances. In my opinion, this power of revocation may only be invoked when the wholesaler is guilty of
violating a provision of the Virginia Tobacco Tax Act or violating valid regulations promulgated pursuant thereto. You state that the question has been presented to you as to whether you may exercise the powers of revocation under the Tobacco Tax Act against the holders of permits thereunder on the ground that they have violated the provisions of the Unfair Sales Act. This would have the effect of the State Tax Commissioner using his powers under the Virginia Tobacco Tax Act as a means of compelling compliance of the Virginia Unfair Sales Act.

As pointed out in your letter, it is provided in § 59-19.1 that the State Tax Commissioner may, after due notice and hearing thereon, suspend or revoke the licenses of any wholesaler of tobacco or groceries or peddlers of tobacco for any violation of Chapter 2 of Title 59, which chapter relates solely to the Virginia Unfair Sales Act. In my opinion, the power of revocation contained in § 58-757.10 must be strictly construed and limited to the language of said section. In my opinion, a permit used under the Virginia Tobacco Tax Act may be revoked only where it is determined that the holder of the permit is guilty of violating any of the provisions of Chapter 14.2 of Title 58 of the Code, or any of the rules of the Department of Taxation adopted and promulgated under the authority of Article 1 of said Chapter 14.2.

WARRANTS—Civil—Destruction—When clerk of court may destroy warrants.

CLERKS—Destruction of Civil Warrants—When to be destroyed.

July 19, 1962

HONORABLE RHEA F. MOORE, JR.
Clerk of Circuit Court of Tazewell County

This is in reply to your letter of July 17, 1962, which reads as follows:

"Dealing with the destruction of civil warrants, paragraph two of Code Section 16.1-118, as passed by the 1962 General Assembly reads: "’(2) Judgment was entered in such case but * twenty years have elapsed since entry of such judgment and the same has not been entered in the judgment lien docket book of the court to which the papers were returned; or * * * ’.

"In the majority of cases, docketings in the Judgment Lien Docket are made from Abstracts furnished by County Court. Then, when the original papers in the cases are transmitted from County Court to this Court, we have not been picking these particular cases out that have already been docketed from all the others. We are seeking your opinion if your interpretation of the paragraph quoted above means that before we could destroy any of these old papers, then that it would be necessary for us to go through all the warrants, and pick out those that had been docketed in the JLD, and preserve them."

The provision to which you refer is, in my opinion, free from ambiguity and subject only to the interpretation that (1) twenty years must have elapsed since the entry of the judgment and, (2) the judgment, or an abstract thereof, has not been entered in the judgment lien docket of the court to which the papers were returned.

In my opinion, a clerk is required by this provision to satisfy himself of these facts before he can destroy the papers in question.
This is in reply to your letter of November 13, 1962, in which you state that the Town of Manassas has issued sewer and water bonds in the amount of $625,000, pursuant to Section 127b of the Constitution, which bond election, no doubt, was held pursuant to the applicable sections of Chapter 19.1 of Title 15 of the Code. You state that the town contemplates depositing the proceeds of the bond sale by certificate of deposit for a twelve-month period under which arrangement the bank will pay the town 4% interest on the deposit. The town then proposes to borrow from the bank at a rate of 3 3/4% interest, as is needed, $500,000 for the purpose of constructing the facilities authorized in the bond issue. Of the amount included in the bond issue $125,000 is to be held in suspense pending additional information from the State Water Control Board as to whether or not certain other sewerage facilities will be necessary.

Assuming that there are no specific Charter provisions to the contrary, the provisions of Chapter 19.1 are controlling with respect to the powers of the town in connection with the handling of these bond issue funds. Section 15-666.48 of the Code, which is contained in Article 5 of Chapter 19.1, under the heading of "Provisions Applicable to All Bonds," permits the governing body of any unit (as defined in § 15-666.15(c) of the Code), pending the application of the proceeds of bond issues to the authorized purpose, to invest the funds in securities that are legal investments under the laws of the Commonwealth for public sinking funds, which shall mature or which shall be subject to redemption not later than twenty-four months after the date of the investment. It would seem, therefore, that the statute does not authorize the governing body of the town to invest the proceeds of the bond issue for a longer period than twenty-four months. The twenty-four months' restriction is contained in §§ 15-666.48 and 15-666.52. This answers the question set forth in your letter as to whether or not the town may continue to deposit its funds after the twenty-four-month period.

Section 15-666.52 relates to the deposit of funds in banks. The last sentence of this section authorizes the governing body, in lieu of retaining such moneys on deposit, to invest the money in the same manner as is authorized in § 15-666.48. You have asked this further question:

"Can the Town borrow under the provisions of the Constitution, Section 127, (a) for periods up to one (1) year, in order to pay its monthly obligations for the construction of its sewer and water plant, knowing that it will re-pay these obligations by the Certificate of Deposit, which it will place with the bank?"

Article 7 of Chapter 19.1 of Title 15 is applicable to temporary loans. In my opinion, §§ 15-666.63 and 15-666.65 must be considered in the absence of any Charter provisions to the contrary. Section 15-666.64 is not applicable as the bonds have been issued and the proceeds of the sale have been received.

Section 15-666.63 provides that money may be borrowed for the purposes therein stated in anticipation of the collection of taxes and revenues. No authority is granted to borrow money to be paid from bond money already on hand. Loans made under § 15-666.63 may be made to mature, and shall be paid, not later than one year after the loan is made.

Section 15-666.65 provides that notes or other obligations issued under §§ 15-666.63 and 15-666.64 may be renewed from time to time, but all such
notes or other obligations shall mature within the time limited by said sections for the payment of the original loan; that is, one year for loans contracted under § 15-666.63 or two years for loans contracted under § 15-666.64. In my opinion, the Town of Manassas and the banks interested in these financial transactions should adhere to the statutory procedure.

WATER AND SEWERAGE SYSTEMS—County Regulation.

January 28, 1963

Honorable John C. Webb
Member, House of Delegates

This is in reply to your letter of January 22, 1963, in which you request my opinion as to the constitutionality of an ordinance which has been adopted by the County of Fairfax known as the "Water Supply Ordinance."

I have reviewed the ordinance which was enclosed with your letter, and while I find several features which are extremely questionable, I am not in the position to state categorically that the ordinance is unconstitutional. There can be little question that the county governing body is empowered to adopt an ordinance pertaining to reasonable health measures which could be applied to water supplies, whether public or private.

Sections 15-8(5) and 15-754.1, Code of Virginia (1950), as amended, very clearly authorize the several counties to take the necessary measures to protect and promote the health and general welfare of inhabitants therein. The measures which are adopted by the counties, however, must have some reasonable relationship to the purpose which is sought to be effected.

While the ordinance which was enclosed with your letter would appear to have the purpose of providing specifications for the installation of wells and other water sources, I have some reservation as to the requirement of a license and bond as a condition precedent to the installation of a private water supply. The required bond is payable to the County of Fairfax and conditioned to indemnify and save harmless the County, as well as any other person, from all expenses and damages that may be caused by any neglect, defective or inadequate work done by the person installing or repairing a well water supply. I am unable to comprehend any connection between the health and safety of inhabitants of the County and such a bond.

In addition to the foregoing, I question whether the County of Fairfax is empowered to adopt an ordinance which would make it unlawful for a person to install or repair a water supply system without first having obtained the approval of the State Board of Health. Section K, under the "General Provisions," makes it mandatory for the approving authority to make inspection during construction to determine compliance with the ordinance. The county governing body is not empowered to require the State Board of Health to make such inspections. It is, therefore, conceivable that the necessary permit could not be acquired due to the failure of the State Board of Health to undertake the duties which are imposed upon such office under this ordinance.

The duties and powers of the State Board of Health in the field of water supply are fixed by statute. The several counties have no authority either to increase or diminish such powers and duties. It is, therefore, my view that the "Water Supply Ordinance" is unenforceable to the extent mentioned above, but there is no constitutional prohibition against the enactment of an ordinance to supplement State statutes regulating water supply systems within the county.
WATER AND SEWERAGE SYSTEMS—County Sewer System—Service may be extended to town residents.

HONORABLE REGINALD H. PETTUS
Commonwealth's Attorney for Charlotte County

This is in reply to your letter of March 12, 1963, which reads as follows:

"The county of Charlotte has a septic tank and drain field which handles the sewage from the county buildings at Charlotte Court House. The town of Charlotte Court House has no sewage system, and a number of private land owners have requested the county to permit them to attach to the county sewage system on a monthly rental basis.

"I question the legality of the county permitting that, since these few property owners would profit from the county system supported by all the taxpayers. In addition to that fact, the system will carry only a few, and the county would soon have to elect which people could use it and which could not."

In my opinion, there is no legal obstacle to the county permitting property owners in the town of Charlotte Court House to connect to the county sewer system. Of course, the county would have to establish a uniform price for making these connections and a uniform fee for the service thereafter. The service to the extent of the capacity of the county system should be offered on a first-come, first-serve basis, and could be discontinued when the capacity of the system has been exhausted.

WATER AND SEWERAGE SYSTEMS—Public Water Supply—Proximity of sewage facilities.

HEALTH—Public Water Supply—Discharge of offensive drainage into source.

Dr. Mack I. Shanholz
State Health Commissioner

This is in reply to your letter of July 9, 1962, which reads as follows:

"Frequently we are requested by municipal and local officials to advise on certain provisions of the Public Water Supply Law. A recent request relates to Section 62-43 of Chapter 3 of the Code.

"In Nansemond County there are several large water supply reservoirs serving both Norfolk and Portsmouth. These waters are treated in conventional purification plants operated by the municipalities.

"While the Law is clear regarding the installation of sewerage facilities, including tile absorption fields in proximity of the main streams and reservoirs, there is some question as to its application to lesser streams, including drainage ditches and highway drains.

"I would appreciate an opinion from you regarding this. I attach for your information copy of a request from the local Medical Director in Nansemond County."

The pertinent provisions in § 62-43 of the Code of Virginia reads as follows:

"It shall be unlawful, except as hereinafter provided, for any person
to defile or render impure, turbid or offensive the water used for the supply of any county, city or town of this State, or the sources or streams used for furnishing such supply, or to endanger the purity thereof by the following means, or any of them, to-wit: * * *, or by discharging or permitting to flow into any such source, spring, well, reservoir, pond, stream, or the tributary thereof, canal, aqueduct, or other receptacle for water the contents of any sewer, privy, stable, or barnyard, or the impure drainage of any mine, any crude or refined petroleum, chemicals, or any foul, noxious, or offensive drainage whatsoever, or by constructing or maintaining any privy vault or cesspool, or by storing manure or other soluble fertilizer of an offensive character, or by disposing of the carcass of any animal, or any foul, noxious, or putrescible substance, whether solid or fluid, and whether the same be buried or not, within two hundred feet of any watercourse, canal, pond, or lake aforesaid, which is liable to contamination by the washing thereof or percolation therefrom; * * *.” (Emphasis added).

From the foregoing portion of the statute which I have emphasized it is readily apparent that any discharge of offensive drainage into any source of water used for supplying any county, city or town is unlawful, if such discharge endangers the purity of the water supply. Conceivably, a reservoir or water supply could be as badly contaminated through a discharge into a lesser tributary many miles away as it could be by a less dangerous discharge into the main tributary.

I, therefore, suggest that the lodestar by which public health authorities are to be guided is the risk of impurity under the peculiar circumstances of each case, rather than the proximity of the discharge to the main stream of the reservoir.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Bond Issue—Purpose must appear in order calling for election.

Honorable Leslie D. Campbell, Jr.
Commonwealth’s Attorney of Hanover County

This is in reply to your letter of March 28, 1963, which reads as follows:

"Hanover County proposes to establish a Sanitary District under Section 21-113 of the Code of Virginia.

"Section 21-113(6) provides that the governing body may levy and collect taxes to render certain services in the District. Section 21-122 of the Code provides for the issuance of bonds for the purpose of revenue to carry into effect the purposes for which the Sanitary District is formed. The issuance of bonds is subject to a referendum as provided in Section 21-123.

"The citizens in the proposed District have asked me whether or not they would be entitled to vote to determine what services would be rendered in the Sanitary District, if created, or if the governing body could arbitrarily provide services in the District and levy a tax for the payment of these services without giving them the opportunity to vote on the question of services to be rendered. I am of the opinion that the services to be rendered by the governing body may be financed by the levy and collection of annual taxes on the property under Section 21-118 and subsequent or the services may be financed by a bond issue under Section 21-122 and subsequent. In the event the bond issue is resorted to then the qualified voters would be entitled to vote upon the services which would be financed under the bond issue. If a bond
issue is not resorted to then the governing body would have the authority to determine what services would be rendered and lay a levy for the payment thereof."

Section 21-123 of the Code provides as follows:

"The circuit court of such county or the judge thereof in vacation, upon the petition of a majority of the members of the governing body of the county, or upon the petition of fifty qualified voters residing in such sanitary district, shall make an order requiring the judges of election at the next election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open a poll and take the sense of the qualified voters of the district on the question whether the governing body shall issue bonds for one or more of the purposes for which the sanitary district was created."

(Underscoring supplied.)

It seems clear under this section that whenever a bond issue election is held under Article 2, Chapter 2, Title 21 of the Code, it is necessary for the purpose or purposes for which the proceeds of the bonds will be expended to appear in the order calling the election and in the question appearing on the ballot.

I do not construe any provision of Chapter 2, Title 21 as placing a limitation upon the powers and duties of the governing body as contained in §21-118 of the Code. Although the proceeds of a bond issue must be expended in accordance with the purposes set forth in the order calling the election, in my opinion, that does not deprive the governing body from providing for other services not specifically financed by the bond issue.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Enlargement—City has no authority.

May 31, 1963

HONORABLE P. M. AXSON, JR.
Commonwealth's Attorney for the City of Chesapeake

This will acknowledge receipt of your letter of May 27, 1963, which reads as follows:

"My problem, for which I seek your guidance and instruction, involves enlarging a sanitary district created under the provisions of Title 21, Chapter 2 of the 1950 Code of Virginia as amended. Prior to the merger of Norfolk County and the City of South Norfolk, which took place January 1, 1963, a sanitary district was created for the purpose of providing water to users within the boundaries of the area under the provisions of Title 21, Chapter 2 of the Code. Subsequent to the creation of the district, bonds were sold to pay for installation of improvements. The City Council of the City of Chesapeake now desires to provide sewage for an area which includes the original sanitary district heretofore referred to and an additional area. That is to say, that the new area, to provide sewage facilities, would include the former sanitary district which provides water and a larger area.

"Title 21, Chapter 2 of the Code grants to 'Counties' the right to create sanitary districts for various purposes, among which are to construct, maintain and operate water supply and sewage disposal systems. That chapter does not refer to cities but refers only to 'Counties.' The Charter for the City of Chesapeake was passed by the 1962 General As-
assembly and is found as Chapter 211 in the Acts of Assembly for that year. Chapter 2 of said Charter grants to the new City all powers allowed a city under general law and, in addition thereto, allows the new city to levy special taxes in any sanitary district to repay indebtedness providing the period of the indebtedness does not exceed twenty years from the date of the Charter. Chapter 2 of said Charter also provides (see Chapter 2, Section 2.02, sub-section (e),) that the new city possesses powers granted the City of South Norfolk and Norfolk County which these governmental units had prior to their merger into a new city.

“This letter respectfully requests that you advise my office at your earliest convenience as to the rights of the City Council, if any there are, to create a sanitary district under the provisions of the laws hereinbefore referred to, or any other laws, for the purpose of supplying water and/or sewage to an area located within the City of Chesapeake. I would appreciate your answer advising me, not only of the statutory provisions, if any, but also the procedure to be followed including the sale of bonds for the purpose of paying for the improvements.”

Chapter 2 of Title 21 of the Code relates to the powers of counties to form sanitary districts and, in my opinion, there is nothing in these statutes which could be construed to confer similar powers upon a city.

I have examined the provisions of Chapter 211 of the Acts of 1962, which set forth the Charter for the City of Chesapeake and have made a careful examination of Chapter 2 thereof, which contains Sections 2.01 and 2.02 of the Charter. In my opinion, these provisions are not sufficient to authorize the council to enlarge a sanitary district that was brought into the city or to create a sanitary district within the city.

You refer specifically to subsection (e) of Section 2.02 of Chapter 2 of the Charter, which reads as follows:

"(e) To exercise all powers possessed by the City of South Norfolk and Norfolk County immediately preceding the effective date of this charter consistent with general law and not inconsistent with this charter."

You suggest that under this provision, the city could possibly establish a special sanitary district for the purpose of supplying water and/or sewage within an area located within the city. In my opinion, this section does not confer such power. If it was the purpose of this provision to confer that power, it is obvious that the Charter fails to provide a method, such as is applicable to counties, for exercising such power. In my opinion, the procedure may not be established by ordinance.

WATER AND SEWERAGE SYSTEMS—Sanitary Districts—No authority to contract with municipality with respect to facilities operated by municipality.

October 17, 1962

HONORABLE E. SUMMERS SHEFFEY
Commonwealth's Attorney of Washington County

This will acknowledge receipt of your letter of October 16, 1962, which reads as follows:

"Washington County Sanitary District No. 1 was organized many years ago under the provisions of what is now Code Section 21-113, et seq.
It comprises the Abingdon and Glade Spring Magisterial Districts of Washington County. The Sanitary District furnishes water to all consumers in the Town of Abingdon, which owns no part of the water system within the Town.

"The Town of Abingdon owns and operates its own sewer system. In order to make its sewer charge collections more efficient and effective, the Town desires to enter into a contract with the Sanitary District, either to have the Sanitary District collect the sewer charge for a fee and to turn off the water of a delinquent account until the charge is paid, or for the Town to continue to do its own billing and collecting with an agreement that the Sanitary District would turn off the water of a delinquent sewer account upon notification by the Town that the sewer charge had been delinquent for a reasonable specified period of time. The latter alternative would be preferable.

"Would you please advise me whether in your opinion it would be legal for the Sanitary District to enter into such an agreement with the Town of Abingdon?"

The powers and duties of the governing body of a Sanitary District are set forth in § 21-118 of the Code. The powers to contract with a municipality relate to the system established by the county. I can find nothing in this section which would indicate that the governing body may contract with a municipality located in the District with respect to the operation of facilities wholly owned and operated by the municipality. I do not feel that an agreement of either type suggested would come within the scope of the authority granted in § 21-118.

I call attention to § 15-13.2 of the Code relating to the joint exercise of powers by political subdivisions. I suggest that the county and the town may have authority under this section to enter into either type of agreement proposed in your letter.

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WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Obligations to be paid from revenues collected.

October 23, 1962

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney of Augusta County

This will acknowledge receipt of your letter of October 22, 1962, relating to the question of a sanitary district obligation to be paid solely out of the revenues collected.

On the basis of the information at hand, I feel that the answer to your question is found in Farquhar v. Board of Supervisors, 196 Va. p. 54. The contract with the developer should clearly show that the reimbursement is to be made solely from collections made from customers using the connections added by reason of the extension of the water main.

I doubt whether the sanitary district could pledge any revenues now being received from the water system without creating a debt. The arrangement suggested under the case cited, that is, pledging only those revenues received from the project being financed, would not be considered as creating a debt.
WATER AND SEWERAGE SYSTEMS—Sanitary Districts—Property subject to assessment for payment of bonds.

May 27, 1963

HONORABLE ROBERT H. WALDO
Commissioner of the Revenue for the City of Chesapeake

This is in reply to your letter of May 23, 1963, which reads as follows:

"Several sanitary districts were created within what is now the City of Chesapeake, under the provisions of Title 21-113 to 140 of the Code of Virginia, 1950, as amended.

"These sanitary districts have each issued bonds for the construction of sewage or water systems and the bonds are being paid out of a special assessment on real estate within the respective districts.

"Please advise me whether or not churches and other charitable institutions, normally exempt from taxation under Section 183 of the Constitution, should be charged with a special assessment to help pay the cost for the retirement of the bonds issued. If so, on what basis should their property be assessed."

The provisions of Section 183 of the Constitution apply to taxes imposed under the provisions of Chapter 2 of Title 21 of the Code to the same extent as they are applicable to other taxes.

Under Article 2 of this chapter, the governing body of a county is authorized to provide for the issuance of bonds for sanitary district purposes, subject to a referendum. Section 21-138, found in Article 2, provides that the governing body shall "... if necessary for the payment of the interest on the bonds or to increase the sinking fund provided for hereunder, levy an annual tax upon all the property in the district subject to local taxation to pay such interest and to make payments into the sinking fund."

You will note that this section authorizes the governing body to levy a tax upon all the property in the district subject to local taxation to pay the interest and principal of the bond obligations. Property exempted from local taxation under Section 183 would, therefore, not be subject to taxation for the purpose of paying sanitary district bonds.

WATER AND SEWERAGE SYSTEMS—State Water Control Board—When authority ceases—Right of owner to abandon system.

March 29, 1963

HONORABLE WILLIAM C. CARTER
Commonwealth’s Attorney of Cumberland County

This will acknowledge receipt of your letter of March 15, 1963, in which you request my opinion ‘as to whether Taylor Manufacturing Company, which is located in Cumberland County, which does not own but who has maintained and serviced for monthly fees a sewer line for approximately forty-five residents of Cumberland County in an unincorporated area known as Jackson Heights, under a certificate from the State Water Control Board, can legally abandon such sewage system if and when the State Water Control Board orders it to treat the waste.”
This system was in existence on July 1, 1946 and, therefore, is governed by § 62-27 of the Code of Virginia (1950), as amended, which states, in part:

"Upon the request of the Board any owner who, on July 1, 1946, was discharging or permitting to be discharged sewage into or adjacent to the waters of the State, shall within twelve months after such request apply to the Board for a certificate to continue such discharge of sewage of substantially the same volume and strength as during the twelve months preceding. * * * * The Board is authorized to issue such certificate for an indefinite period; provided, however, the certificate may be revoked at any time when it is found on investigation that there has been an increase in the strength or volume of the sewage as discharged into or adjacent to any State waters, or the Board has reason to believe an increase is contemplated. If no satisfactory progress is made by the owner toward the reduction of pollution, the Board may require the holder of the certificate to file reasons therefor or may, in the case of refusal to comply with recommendations deemed reasonable by the Board, revoke the certificate issued to such owner and issue a special order. * * * *

The word "owner" is defined by § 62-11 of the Code as follows:

"(5) ‘Owner’ means the State, a county, sanitary district, municipality, public or private institution, corporation, association, firm or company organized or existing under the laws of this or any other state or country, person or individual or group of persons or individuals, acting individually or as a group; * * *"

A review of the Water Control Board's file in this matter reveals that the main interceptor line of the system which has been maintained by Taylor Manufacturing Company runs through and is located in the property of Taylor Manufacturing Company just prior to the discharge of the sewage to State waters. Therefore, Taylor Manufacturing Company, an owner by statutory definition, is "permitting to be discharged sewage into or adjacent to waters of the State" since it allows this sewage to be conveyed through the main interceptor located on its property. Furthermore, Taylor Manufacturing Company is subject to regulation by the Water Control Board under § 62-27 so long as it permits the sewage to be conveyed through this line and it cannot escape the responsibility to the Board for such sewage by merely stating that it is abandoning the system.

If the Taylor Manufacturing Company decides to close off the interceptor line running through its property, then there would be no further discharge to State Waters and the Water Control Board would have no further jurisdiction in the matter until a discharge to State waters was resumed or planned.

WATER AND SEWERAGE SYSTEMS—Zoning Ordinance—Authority of county over location.

HONORABLE LESLIE D. CAMPBELL, JR.
Commonwealth's Attorney for Hanover County

This is in reply to your letter of September 7, 1962, in which you request my opinion concerning the procedure to be employed by the Board of Supervisors of Hanover County in processing an application which has been made by the Town of Ashland for permission to establish a lagoon-type sewerage system in the County.
Your letter reads, in part, as follows:

"I have been advised by the Water Control Board that under its Regulation 3, the County must grant a use permit for the location of this sewage facility before the Water Control Board will act on the Town's request. Under Section 15-923 of the Code, it would appear that the location would be submitted for approval to the County Planning Commission without the issuance of a use permit by the Board of Supervisors.

"My questions are as follows:

1. Can a regulation of the Water Control Board require the County to issue or refuse to issue a use permit to the Town of Ashland as a condition to its approval and issuing of a certificate for the discharge of waste from the sewage facility into a stream, since a use permit is not required under Section 15-923 of the Code?

2. If the County proceeds under its Ordinance and under Section 15-923 of the Code in lieu of issuing a use permit, and the location of the sewage facility is approved, could the Water Control Board act upon this approval as if a use permit had been issued?

3. Generally, is it not the County's right and obligation to determine its zoning procedure under its Ordinance, and the Water Control Board's right and obligation to control the pollution of State waters?"

I am not familiar with the Regulation of the State Water Control Board here in question, but I presume it is a valid exercise of the powers conferred by § 62-63, Code of Virginia (1950), as amended. Accordingly, in the absence of some irreconcilable statutory conflict, I am of the opinion that the Water Control Board may require an applicant for a certificate first to obtain a use permit from the local governing body before acting upon an application under the provisions of the State Water Control Law.

Section 15-923, Code of Virginia (1950), a portion of Article 3, Chapter 25, Title 15, was repealed at the 1962 session of the General Assembly and was reenacted as a portion of Chapter 28 of Title 15. The new section relating to the subject matter of former § 15-923 now appears as § 15-964.10.

By virtue of § 15-961.2 of the Code, any master plan heretofore adopted by a county, pursuant to any prior legislation, is validated and the existing planning commission continues to operate as though created under the terms of the new legislation. I, therefore, refer to § 15-964.10 of the amended Code when replying to your inquiries concerning § 15-923.

The legislative intent is expressed in the newly enacted Chapter of Title 15, in § 15-961. As to the function of the Planning Commission, the following language from that section is apropos:

"In accomplishing the foregoing objectives such planning commissions shall serve primarily in an advisory capacity to the governing bodies."

I have examined the provisions of § 15-964.10 of the Code and am unable to conclude that there is an apparent conflict between this section of the Code and the requirement of the State Water Control Board that an applicant for a certificate from that body first obtain the consent of the governing body for the location of a proposed sewerage system.

It is quite manifest that any plan for a proposed sewerage facility within a county having adopted a Master Plan and created a Planning Commission must be submitted to the Planning Commission for action, pursuant to § 15-964.10 of the Code. Without undertaking to express a view on the effect of the action of the Planning Commission upon the Board of Supervisors, I think that the Board's use permit would in all likelihood be superfluous when the Planning Commission
approves the location of a proposed facility. On the other hand, such a use permit would appear meritorious in event the Planning Commission disapproves the location. Section 15-964.10 of the Code places a veto power in the governing body over the Planning Commission when the Commission disapproves a proposed use of land in the county. I do not believe that the requirement of the Water Control Board for a use permit from the governing body is in conflict with the statutory provision which prohibits construction of any such facility unless and until action has been taken thereon by the Planning Commission.

Your second inquiry does not lend itself to a categorical answer, since I am not familiar with the regulation of the Water Control Board. Whether the approval of the location of the proposed facility by the Planning Commission of the County would satisfy the requirement for a use permit, as set forth by the regulation of the Water Control Board, would appear to be a matter which that Board should pass upon.

Your third inquiry may be somewhat overly simplified for an unqualified answer, since both the County and the Water Control Board will perform governmental functions involving the same subject matter; i.e., regulating a particular land use. Conceivably, there are instances in which the functions of the local governing body and the State regulatory board may overlap or dovetail, even though each is operating within the scope of its authority.

As a general proposition, I think it is fair to state that the primary concern of the governing body is to assure the use of land within the County in accord with the comprehensive plan for development, whereas the principal concern of the State agency is determining whether or not the proposed use will adversely affect the purity of State waters.

WELFARE—Dependent Child—Ineligible for relief when residing within Federal area when exclusive jurisdiction ceded.

HONORABLE W. L. PAINTER
Director of the Department of Welfare and Institutions

March 20, 1963

This is to acknowledge receipt of your letter of March 14, 1963, in which you request my opinion on the question of whether or not five dependent children, all under the age of ten years, residing with their mother on the Fort Lee Military Reservation are eligible for aid under the provisions of Chapter 7, Title 63, Code of Virginia (1950), as amended, commonly known as the "Aid to Dependent Children" act. You state that the father of these children, a former soldier, was court-martialed in October, 1962, and is now incarcerated in the federal prison at Fort Leavenworth, Kansas. The local welfare department of Prince George County has denied the application for relief and the matter is now before the State Welfare Board on appeal.

Section 63-141 sets forth the conditions under which a dependant child is eligible to receive benefits under said act. That section provides in part:

"A dependent child shall be eligible for aid to dependent children if such child:
"Has resided in this State for one year immediately preceding the application for such aid, or was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided within this State for one year immediately preceding such birth." (Italics supplied).
Section 63-142 provides that application for aid shall be made to the local board of the county or city in which the dependent child resides.

Are these children residents of Prince George County, Virginia, within the meaning of the aforesaid act? The act does not define the term "resident", hence, the usual meaning ascribed to that term applies. The answer to this question depends upon the jurisdiction, if any, exercised by the State of Virginia over the lands comprising the Fort Lee Military Reservation. The area upon which Fort Lee is located was acquired by the federal government during the First World War (1917-1918) from private ownership. The Commonwealth of Virginia gave her consent to this acquisition in Chapter 382, Acts of the General Assembly, approved March 16, 1918. Exclusive jurisdiction was ceded, with the State reserving the right to serve criminal and civil process within the bounds of the lands so acquired. This office has heretofore expressed the view that whether persons residing on federal reservations are residents of Virginia depends upon the type of grant acquired by the United States. Report of Attorney General, (1946-1947), p. 82. The jurisdiction of the United States over the lands so acquired cannot be affected by subsequent State legislation. This is recognized by § 7-19 of our present 1950 Code, as the concluding sentence of that section is as follows:

"Nothing herein contained shall affect any special act heretofore or hereafter passed ceding jurisdiction to the United States."

Article 1, Section 8, Clause 17 of the Federal Constitution prescribes the jurisdiction over places (lands) purchased for the erection of forts, magazines, arsenals, etc. That clause is as follows:

"Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

In the case of Fort Leavenworth Railroad Company v. Lowe, 114 U. S. 525, 29 L. Ed. 264, 5 S. Ct. 995, (the leading case on this subject), the Supreme Court stated:

"When the title is acquired by purchase by consent of the legislatures of the States, the Federal jurisdiction is exclusive of all State authority." (Italics supplied).

From the foregoing, it would follow that the United States exercise the same type of exclusive jurisdiction over the lands of Fort Lee as they do over the lands comprising the District of Columbia, with the exception that the State of Virginia has the right to serve criminal and civil process thereon. I am, therefore, of the opinion that these dependent children residing on the Fort Lee Reservation are not residents of Virginia and are, therefore, ineligible for relief under the provisions of Chapter 7, Title 63, of the Code of Virginia (1950), as amended.
REPORT OF THE ATTORNEY GENERAL

WELFARE—Lien Created Against Land of Recipient—No authority in local board to waive or release.

September 20, 1962

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This will reply to your letter of September 5, 1962, in which you present the following situation and inquiry:

"Under the provisions of Section 63-127, a local Board of Welfare, following the death of a recipient of old age assistance, obtained a lien against the real estate of the recipient by filing in the Clerk's Office of the Circuit Court of the county where the recipient's real estate is located, the requisite notice. The heirs at law of the recipient of old age assistance have granted an easement to a municipal corporation for a sewer pipe line passing through the land upon which the lien was created, as aforesaid.

"Does the local Board of Public Welfare, which obtained the lien, have the authority to release the lien as to the easement granted to the municipal corporation?"

This office has previously ruled that a local board of public welfare has no authority to waive or release the claim created in its favor by Section 63-127 of the Virginia Code, Report of the Attorney General (1953-1954) p. 169, and I have been unable to discover any provision of Virginia law which empowers such boards to release the lien of the statute in question with respect to easements granted municipal corporations by heirs at law of a deceased recipient of old age assistance. I am, therefore, of the opinion that your inquiry must be answered in the negative.

WITNESSES—Allowance—When medical examiners entitled to fees and expenses.

CRIMINAL PROCEDURE—Costs—When medical examiners entitled to fees and expenses.

July 19, 1962

HONORABLE J. VAUGHAN BEALE
Commonwealth's Attorney for Southampton County

This is to acknowledge receipt of your letter of July 17, 1962, in which you state in part:

"Frequently the Coroner in Southampton County, Virginia, appears in court to testify in criminal cases, and to date I do not recall that he has ever made a charge for this.

"Recently Dr. X, as Coroner, testified in the above case in the Circuit Court of Southampton County and forwarded a statement to the Clerk of the Court in the amount of $150.00 for his appearance in the above matter. Dr. X was in Court two days for about a total of eight hours, spending about four hours each day testifying in this matter."

As you know, coroners, who are now designated as medical examiners, are required to make written reports concerning their findings in cases where a person has met a violent death. For making this report, the medical examiner is paid a fee of fifteen dollars pursuant to § 19.1-42 of the Code of Virginia (1950)
as amended,—ten dollars for such service prior to June 29, 1962. Such a report may be introduced in evidence, as authorized by § 19.1-45 of the Code of Virginia (1950), as amended. From what you state, the doctor, as medical examiner, was summoned to testify in the Circuit Court in a criminal case.

The question to be determined is whether the doctor has rendered any other service in the State for which no specific compensation is provided and could be paid under § 19.1-315 of the Code of Virginia (1950), as amended. This is a matter for the court to determine. If he has not rendered any special service as contemplated by § 19.1-315, he would be entitled to the regular fees as prescribed in § 14-186 or § 19.1-312 of the Code of Virginia (1950), as amended, as the case may be, those sections of the Code allowing a fee of fifty cents plus mileage at the rate of seven cents a mile over five miles in addition to the necessary ferries and tolls, or a fee of $1.00 per day when he has traveled more than fifty miles, respectively.

WITNESSES—Immunity from Prosecution—Attorney for Commonwealth may not promise immunity in order to induce witness to waive constitutional privilege.

MOTOR VEHICLES—Radar—Equipment must be tested at each location.

Honorable Sol Goodman
Commonwealth's Attorney for the City of Hopewell

September 25, 1962

This is to acknowledge receipt of your letter of September 18, 1962, in which you request my opinion on two questions. I shall answer the same seriatim.

Question No. 1. “Can the Commonwealth's Attorney promise immunity to a witness in order that the Fifth Amendment can be dispensed with?”

Answer: Immunity from prosecution granted to accomplices who become witnesses for the government stems from the ancient law of approvement. Under such a practice, if the person accused by the approver was found guilty, the approver was entitled to his pardon, but if the person against whom the approver testified was acquitted, the approver was hanged. The law of approvement was never practiced in Virginia. Commonwealth v. Dabney, 1 Rob. (Va.) 696. In fact, § 19.1-244, Code of 1950 as amended, expressly prohibits the admission of approvers. In some jurisdictions, there are statutory and constitutional provisions to the effect that when a witness testifies for the prosecution under an agreement that he shall not be prosecuted, he is entitled to immunity from prosecution. (22 C.J.; Criminal Law, § 46(7), p. 179). Where there is no such statutory or constitutional provision, then the party has only an equitable right of immunity from prosecution or to a pardon based on the pledged faith of the public. (22 C.J.; Criminal Law, § 46 (1), p. 157). In Virginia, there is no statutory or constitutional provision sanctioning the making of agreements between the prosecuting authorities and the prosecution witnesses guaranteeing immunity from prosecution. I can find no recent case in Virginia on this subject, but it is felt that the doctrine laid down in the case of Commonwealth v. Dabney, supra, would be applicable to a question of whether or not an agreement between the witness and the Commonwealth’s Attorney not to be prosecuted would be valid. In that case, the Court held:

“Though a particeps criminis, called as a witness for the commonwealth on the trial of his accomplice, voluntarily give evidence, and fully, candid and impartially disclose all the circumstances attending the
transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt, and therefore no right to demand a continuance of his cause until he can have an opportunity to apply to the executive for such pardon."

The entry of a *nolle prosequi* is not a bar to further proceedings. 6 M.J., Dismissal, Discontinuance and Non Suit, § 38.

The only reason to invoke the Fifth Amendment or Section 8 of the Virginia Constitution on the part of a witness is to prevent prosecution on the basis of his own testimony. Unless there is absolute right extended to such a witness to use such an agreement as a bar to future prosecutions, he cannot be compelled to testify, not withstanding an agreement with the prosecuting attorney not to prosecute.

Therefore, the answer to this question is in the negative.

Question No. 2. "The City of Hopewell has a portable radar attached to its patrol car. Is it necessary that a test be made as to the accuracy of the radar each and every time the patrol car moves from one location to another?"

Answer: In the case of *Royals v. Commonwealth*, 198 Va. 876, 881, the Court stated:

"The language of the statute [46.1-198] indicates that the members of the General Assembly were familiar with these authorities when it was adopted. It makes the rate of speed indicated by radiomicro waves or other electrical devices admissible evidence in any proceeding where the speed of a motor vehicle is in issue without the necessity of proving by expert testimony the theory and operation of such methods of measuring speed. *It does not eliminate the necessity for the Commonwealth to prove that the machine used for measuring speed had been properly set up and recently tested for accuracy.*" (Italics supplied).

It would appear, therefore, that the radar machine must be tested for accuracy each time it is set up and used. The fact that it happens to be a portable radar attached to a patrol car which is moved from place to place does not eliminate the necessity of testing.

This question, therefore, must be answered in the affirmative.

In passing, it should be noted that the test for accuracy may be accomplished in various ways and not restricted to the manner of testing (for a car with calibrated speedometer run through the zone of the meter twice, once at a speed for the zone and once at a speed ten or fifteen miles per hour greater) mentioned in the *Royals* case, *supra*, as there are now other means of testing accuracy which are equally acceptable. I suggest that you contact the State Police concerning this aspect of the problem.

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**ZONING—Appeals.**

*Honorable G. Garland Wilson*
City Attorney for the City of Radford

May 6, 1963

This is to acknowledge receipt of your letter of April 27, 1963, in which you request my opinion on questions concerning the interpretation of the zoning statutes. I shall answer the questions *seriatim.*
Question: "The City Manager of Radford issued a building permit in accordance with local ordinance for the construction of a multiple unit dwelling. The building to be constructed is within the area provided for multiple unit dwellings. I should like your opinion as to whether or not the adjacent property owners have an Appeal as a matter of right from the decision of the City Manager in granting the permit, as provided for in Section 15-968.9 and Section 15-968.10 of the 1962 Cumulative Supplement to the Code of Virginia. 1950?"

Answer: Section 15-968.10 of the Code of Virginia, as amended, provides:

"An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator." (Italics supplied).

A zoning administrator is an officer appointed for the purpose of administering and enforcing the zoning ordinance. Section 15-968.5. The issuing of a building permit in accordance with the zoning ordinance would necessarily involve a decision of such administrator.

I am of the opinion that adjacent property owners, upon a showing that they would be aggrieved by the decision of the zoning administrator in issuing a building permit, have an appeal as a matter of right to the Board of Zoning Appeals.

Question: "Do these statutes apply to an Appeal only on the question of a Variance and Non-Conforming use? Our local ordinance, which was adopted prior to June 29, 1962, provides that the local Board of Zoning Appeals may hear and decide Appeals only when it is alleged that there is error in the interpretation of any provision of the applicable ordinance."

Answer: Section 15-968.9 of the Code which enumerates the powers and duties of the boards of zoning appeals provides among other things the following, to-wit:

"Boards of zoning appeals shall have the following powers and duties:

"(a) To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto; . . ."

The power granted by this section is plenary, and I believe broad enough to apply to any question concerning the validity of the act taken by an administrative officer in enforcing the terms of the zoning ordinance. I am not unmindful of §§ 15-969.2 and 15-969.3 of the Code. The ordinance to which you made reference was adopted under the authority of former Chapter 24, Title 15, Code of Virginia. Under the provisions of this chapter, an aggrieved person had an appeal to the Board of Zoning Appeals from a decision of a zoning administrator. In this connection, see former §§ 15-828 and 15-831 (1), which have substantially the same language above-quoted. It would follow that the ordinance adopted prior to June 29, 1962, could not circumscribe or limit the right to appeal from any decision of the zoning administrator, same being governed by the statute.

I am, therefore, of the opinion that §§ 15-968.9 and 15-968.10 of the Code of Virginia do not apply solely to questions of variance and non-conforming use.
ZONING—Board of Zoning Appeals—Effect of 1962 legislative changes.

HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney for the County of Fairfax

February 4, 1963

This is in reply to your letter of January 30, 1963, which reads, in part, as follows:

"Under Article 2 of Chapter 24, the Board of County Supervisors of Fairfax County created a Board of Zoning Appeals and appointed its members for staggered terms. Section 15-961.2 of the new Chapter 28 provides in part: 'The membership of existing . . . Boards of Zoning Appeals shall continue unchanged until the first regular meeting of the governing body of the county . . . in January, 1963. At that time any appointments or changes needed to conform any such . . . Board to the requirements of this Chapter shall be made.' Section 15-968.8 provides that the Board of Zoning Appeals shall be appointed by the Circuit Court of the County and the five members of such shall be appointed for a term of five years except that the initial appointments shall be staggered so that the term of one member shall expire each year.

"Since the term of the members heretofore made by the Board of Supervisors expire one each year, the question has arisen as to when their offices shall be vacated or in other words does the new act vacate all offices of the members at this time with an entire Board being appointed now by the Circuit Court or should the Circuit Court fill each vacancy as the terms of the present members expire?"

For our immediate purposes, the only material difference in the Board of Zoning Appeals appointed pursuant to §15-968.8 of the Code and the Board appointed under the repealed section of Chapter 24 of Title 15 of the Code is the appointing authority. Previously, the governing body appointed the members, while under the revised statute the Board is appointed by the Circuit or Corporation Court. In addition, the terms are now specific and the membership of the Board expressly limited to five.

Section 15-961.2 of the revised statutes relating to this subject continues in effect the membership of existing boards, but does require action on the part of the governing body to make the necessary changes to conform to the requirement of the revised law. Assuming the present Board of Zoning Appeals for the County of Fairfax consists of five members, I believe the membership already conforms to §15-968.8 of the Code, and no further changes are now necessary. The present members continue in office until their successors are appointed. It goes without saying, however, that all new appointments and any appointments to fill vacancies are to be made pursuant to §15-968.8 of the Code.

ZONING—Board of Zoning Appeals—Effect of 1962 legislative changes when existing board conforms to new law.

HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney for Fairfax County

February 12, 1963

This is in reply to your letter of February 8, 1963, which has further reference to my letter to you under date of February 4, 1963.

You are interested in making certain whether or not the terms of office of the
present members of the Board of Zoning Appeals expired automatically in January and all members must now be appointed by the Circuit Court.

The answer to this inquiry is in the negative. The present board conforms to Chapter 28, Title 15 of the Code if it is composed of five members with staggered terms extending over a five-year period. Such members remain on the board until their terms expire and their successors are appointed by the Circuit Court.

ZONING—Cemeteries—Additional ordinance unnecessary when procedure provided in ordinance.

COUNTIES—Cemeteries—Procedure for establishing.

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

June 25, 1963

This is in reply to your letter of June 20, 1963, which reads in part as follows:

"I am writing to obtain your opinion as to the provisions of Section 57-26, Code of Virginia.

"On May 5, 1949, the Board of Supervisors of August County, Virginia adopted an amendment to their zoning ordinances providing that any firm, person, etc., desiring to establish a cemetery should file an application with the Board of Zoning Appeals, requesting the permit. The ordinance goes on to say that there shall be a public hearing, after proper notice, and action is then taken on the application.

"The language of Section 57-26 is not clear to me wherein it reads:

'[No cemetery shall be hereafter established within a county . . . unless authorized by appropriate ordinance subject to any zoning ordinance duly adopted by the governing body of such county.]

(Underscoring supplied)

"It would appear to me that since the zoning ordinance already in effect provides the manner for the establishment of the cemetery, that an additional ordinance is not required to authorize the particular firm or person to establish the cemetery on the authority from the Board of Zoning Appeals."

The statutory restrictions on the location of cemeteries were first enacted to prohibit them within the corporate limits of any city or town, or within four hundred yards of any residence without the consent of the owner (see, § 1414, Code of 1887).

In the 1954 session of the Legislature, the pertinent language of the present statute was amended to read as follows:

"§ 57-26. (1) Restrictions as to location.—No cemetery shall be hereafter established within the corporate limits of any city or town unless authorized by appropriate ordinance subject to any zoning ordinance duly adopted by the governing body of such county, city or town; ***." (Emphasis added to indicate new language)

In the 1960 session of the Legislature, the foregoing quoted language was made applicable to counties, as well as cities and towns.

The legislative history of § 57-26 of the Code indicates that the location of cemeteries has always been closely regulated by the General Assembly. By the 1954 amendment to this section, the Legislature provided that cemeteries could be
established in cities and towns, but only upon enactment of an appropriate ordinance. The addition of language “subject to any zoning ordinance duly adopted by the governing body of the county, city or town” would indicate that any cemetery ordinance would be subject to any zoning ordinance which may be applicable, whether passed by the city, town or county, prohibiting the establishment of cemeteries.

In short, subsequent to 1954, a cemetery could be established within a city or town if authorized by city or town ordinances, and the establishment thereof would not violate the provisions of an applicable zoning ordinance. By virtue of the 1960 amendment to § 57-26 of the Code, the same limitations were extended to counties.

From the foregoing, it appears that the intention of the General Assembly at the time of the original enactment of this statute was to prohibit the establishment of new cemeteries within cities and towns. The legislative intent, as reflected by the last two amendments, is now to provide for establishment of new cemeteries in cities, towns and counties pursuant to local ordinance. If there is a zoning ordinance in effect within the locality which provides authority for the establishment of cemeteries, no further authority is required. If, on the other hand, there is no applicable zoning ordinance, a cemetery may not be established until authorized by local ordinance. In the event of a zoning ordinance containing a prohibition against cemeteries, that ordinance would preclude the adoption of an ordinance authorizing the establishment of a cemetery. Of course, the zoning ordinance could be amended by proper statutory procedure.

Inasmuch as the governing body of Augusta County has adopted a zoning ordinance which provides a procedure for obtaining a permit for the establishment of a cemetery, I am of the opinion that no further legislative action is required, so long as such cemeteries are located outside the corporate limits of any town within the county.

ZONING—Ordinance—Amendments—Referendum necessary in Albemarle County.

Honorable Downing L. Smith
Commonwealth’s Attorney for Albemarle County

March 22, 1963

This is in reply to your letter of February 20, 1963, in which you request my opinion as to the necessity of a referendum each time a proposed zoning ordinance is amended, if such an ordinance is enacted by the County of Albemarle pursuant to § 15-274.1, Code of Virginia (1950), as amended.

In the 1962 session of the General Assembly, comprehensive enabling legislation was adopted to empower the counties and municipalities to plan, subdivide and zone the territory within the respective localities. While most of the existing statutory authority and procedures governing such action were repealed by Chapter 407, Acts of 1962, no reference was made therein to § 15-274.1 of the Code. That section reads, in part, as follows:

“The board of county supervisors of any county which has adopted the county executive form of organization and government provided for in this article shall have the same powers as to zoning ordinances as is provided by general law subject, however, to the following conditions except in counties which adopted the county executive form of organization after January one, nineteen hundred fifty: No zoning ordinance adopted by such board shall be effective unless and until the same shall have been approved by the qualified voters of the county voting at an election called and held as hereinafter provided. * * * *”
I am of the opinion that the foregoing statutory provision continues in effect in the counties within the contemplation of the quoted language; hence, a favorable referendum is a necessary prerequisite to the adoption of a zoning ordinance.

It is well recognized that, in absence of legislation to the contrary, the procedure for the amendment of an ordinance is the same as that provided for the enactment of such ordinance. See 51 Am. Jur. 92; Reports of Attorney General (1947-1948), p. 126; (1960-1961), p. 66.

In view of the foregoing, I am of the opinion that it will be necessary to hold a referendum each time an amendment is proposed to a zoning ordinance adopted pursuant to § 15-274.1 of the Code.

ZONING—Ordinance—Effect of repeal of statute requiring referendum.

ORDINANCES—Zoning—Effect of repeal of statute requiring referendum to amend ordinance.

Honorable Downing L. Smith
Commonwealth's Attorney for Albemarle County

May 24, 1963

This has reference to your letter of May 23, 1963, in which you make further inquiry concerning the proposed zoning ordinance by the County of Albemarle.

Under date of March 22, 1963, I advised you that I was of the opinion that any amendments which may be proposed to the ordinance must be submitted to the people by referendum, due to the provision in § 15-274.1 of the Code requiring approval in an election as a condition precedent to such an ordinance becoming effective. I advised that in absence of legislation to the contrary, the procedure for the amendment of an ordinance is the same as that provided for the enactment.

You now wish to be advised as to the status of the County ordinance in the event of legislative repeal of § 15-274.1 of the Code. (After July 1, 1964, this section will be codified as § 15.1-591 of the Code).

The general law on the subject of zoning is codified as Chapter 28, Title 15, Code of Virginia (1950), as amended. Article 8 of that chapter provides for the adoption and amendment of zoning ordinances by any governing body of any county or municipality.

The significance of § 15-274.1 of the Code is the requirement for an affirmative vote of the people before the governing body of the counties affected by that section may exercise the authority granted by the general law.

I have reviewed the preliminary draft of the Albemarle County zoning ordinance, dated March, 1963. The authority set forth in the ordinance is the legislative enactment codified as Chapter 28, Article 8, §§ 15-968 through 15-968.12 of the Code of Virginia, this being the general law on the subject of zoning. Article 15 of the proposed ordinance provides for amendments thereto, which procedure is essentially that which is contained in Article 8, Chapter 28, Title 15 of the Code.

In the event of repeal of § 15-274.1 of the Code, either before or after enactment of the proposed zoning ordinance, the County of Albemarle would stand in the same position as any other county with respect to the authority to adopt or amend zoning ordinances. Such a repeal would have no effect on the validity of an ordinance which may have been adopted, for the county would then operate pursuant to the authority in Chapter 28. Title 15 of the Code. Any amendments to that ordinance would be effected by following the procedure set forth in Article 15 of the county ordinance, which is essentially the same as provided in Article 8, Chapter 28, Title 15 of the Code.
ZONING—Ordinance—Hearing required before planning commission submits proposal to governing body.

April 9, 1963

Honorable G. Garland Wilson
City Attorney for City of Radford

This is in reply to your letter of April 5, 1963, which reads as follows:

"The Local Planning Commission of this City has made a recommendation to the City Council for an immediate amendment of a zoning ordinance which the Council desires to enact. The Local Planning Commission did not hold a public hearing on the proposed amendment, and was not directed to do so by the governing body.

"My question to you is whether or not under Section 15-968.7 of the 1962 Cumulative Supplement the Council may proceed to hold a public hearing on the ordinance and enact the same without a public hearing by the Planning Commission."

Section 15-968.7, Code of Virginia (1950), as amended, reads as follows:

"The local commission of each county or municipality may, and at the direction of the governing body shall, prepare a proposed zoning ordinance including a map or maps showing the division of the territory into districts and a text setting forth the regulations applying in each district. The commission shall hold at least one public hearing on such proposed ordinance or any amendment of an ordinance, after notice as required by § 15-961.4, and may make appropriate changes in the proposed ordinance or amendment as a result of such hearing. Upon completion of its work, the commission shall present the proposed ordinance or amendment including the district maps to the governing body together with its recommendations and appropriate explanatory materials.

"After June twenty-ninth, nineteen hundred and sixty-two, no zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local commission for its recommendations. Failure of the commission to report in sixty days or such shorter period as may be prescribed by the governing body shall be deemed approval.

"Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15-961.4, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment. An affirmative vote of at least a majority of the members of the governing body shall be required to adopt, amend or reenact a zoning ordinance." (Italics supplied)

It is readily apparent from the foregoing quoted provision that the local planning commission must hold at least one hearing on any proposed amendment of a zoning ordinance prior to presenting the proposed amendment to the governing body for action. Subsequent to June 29, 1962, the governing body has been without authority to amend a zoning ordinance without first submitting the proposed amendment to the local commission for its recommendation.

In view of the express provision of the aforementioned statute requiring a public hearing to be held by the planning commission before recommending a proposed change in the zoning ordinance, I am of the opinion that the City Council may not proceed to hold a public hearing as contemplated in the final paragraph of § 15-968.7 of the Code until the local planning commission has taken the contemplated action set forth in the first paragraph of that section.
ZONING—Ordinance—Public hearing—No waiting period required between hearing of planning commission and governing body.

HONORABLE G. GARLAND WILSON
City Attorney for the City of Radford

This is in reply to your letter of April 11, 1963, which has further reference to my letter to you under date of April 9, 1963.

In view of my conclusion expressed in the letter of April 9, 1963, that the Planning Commission, as well as the local governing body, is required to conduct a public hearing before recommending an amendment in a zoning ordinance, you now ask to be advised whether or not any waiting period is required between the hearing conducted by the Planning Commission and the hearing conducted by the governing body.

The requirement for notice for enacting or amending zoning ordinances is provided in § 15-961.4, Code of Virginia (1950), as amended. That section reads as follows:

"Plans or ordinances or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a reference to the place or places within the county or municipality where copies of the proposed plans, ordinances or amendments may be examined.

"When public notice is required by this chapter, the local commission shall not recommend nor the governing body adopt any plan, ordinance or amendment until notice of intention so to do has been published once a week for two successive weeks in some newspaper published or having general circulation in such county or municipality. Such notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than five days nor more than ten days after final publication.

"After enactment of any such plan, ordinance or amendment further publication thereof shall not be required."

The requirement for conducting a public hearing by the planning commission and the local governing body is set forth in § 15-968.7 of the Code. Neither that section nor the section above quoted makes any provision for a waiting period between the two public hearings which must be conducted prior to amending a zoning ordinance. The first hearing is to be held by the planning commission prior to making its recommendation to the governing body. The governing body must then hold a public hearing before passing upon the recommendation made by the planning commission. So long as the statutory notice is given prior to conducting the public hearing, I see no legal objection to conducting the hearing of the planning commission on one day and conducting the public hearing before the governing body on the following day.

I should point out, however, the danger attendant upon such a procedure. The advertising requirement in § 15-961.4 provides that reference must be made to the place where copies of the proposed amendments may be examined. If the planning commission should make any change in the proposed amendment as a result of the hearing, it would likely follow that the notice given by the governing body would be held defective on the ground that the proposal was different from that referred to in the notice.

The foregoing conclusion that no waiting period is required between the two hearings is, therefore, based on an assumption that the amendment to be acted on by the governing body will be the proposal which was advertised in the notice given pursuant to § 15-961.4 of the Code.
REPORT OF THE ATTORNEY GENERAL

ZONING—Planning Commission—Applicability of Chapter 28 of Title 15—When effective, how existing commission affected, and authority of council to alter.

CITIES—Planning Commission—Effect of Chapter 28 of Title 15 upon existing commission.

HONORABLE FRED W. BATEMAN
Member, Virginia State Senate

This is in reply to your letter of July 12, 1962, in which you ask my opinion with respect to a series of questions contained in a letter to you under date of July 10, 1962, from Mr. Harry E. Atkinson, all of which relate to Chapter 28 of Title 15 of the Code of Virginia. I shall state and answer the questions in the order in which they appear in Mr. Atkinson's letter:

Question 1. "Can Newport News enact an ordinance setting up a local planning commission in accord with the provisions of Chapter 28, Title 15, Code of Virginia, now or must we wait till 1 January 1963? [15-961.2]"

As I construe § 15-961.2, the membership of the existing planning commission which was adopted on July 1, 1958 by ordinance No. 192, copy of which you have submitted to this office, is continued unchanged until the first regular meeting of the governing body of the city in January, 1963. This will prevent the city council from establishing a local planning commission prior to the above date.

Question 2. "Can Newport News continue to operate under our previously enacted ordinance, a copy is attached, until 1 January 1963?"

The third paragraph of § 15-961.2 of the Code is as follows:

"The adoption of a comprehensive or master plan or any general development plans under the authority of prior acts is hereby validated and shall continue in effect until amended under the provisions of this act."

In my opinion, under this provision, the present ordinance continues in effect.

Question 3. "Are the members of the Newport News Planning Commission holding office on 28 June 1962 continued in office to 1 January 1963 without regard to expiration of term of original appointment?"

The answer to this question is in the affirmative. It is expressly provided in § 15-961.2 that:

"The membership of existing planning commissions and boards of zoning appeals shall continue unchanged until the first regular meeting of the governing body of the county or municipality in January nineteen hundred sixty-three. At that time any appointments or changes needed to conform any such commission or board to the requirements of this act shall be made."

Question 4. "Is Council bound to appoint for terms of 1, 2, 3 and 4 years or may the Council appoint all for 4 year terms? [15-963]"

By reference to § 15-963, it will be noted that although the statute provides for staggered appointments on the local planning commission, the local govern-
ing bodies are expressly given the power to establish different terms of office for initial and subsequent appointments. Therefore, the answer to this question is in the negative.

Question 5. "Under the terms of the State Code and reading our present ordinance [copy attached] in conjunction therewith, may the Council appoint members of the Planning Commission not to exceed 7? May the Council by ordinance appoint more than 7? May only the Mayor appoint 7?

"As you can see from the foregoing the Council would like to rewrite the ordinance now and bring it into consonance with the Chapter 28 of Title 15 and appoint 15 members for 4 years. If we must wait until 1 January 1963 to rewrite our ordinance we would like an opinion as to how we should proceed to appoint members, how many we can appoint and for what terms we must appoint."

The statute provides for a commission which shall consist of not less than five nor more than fifteen members. Therefore, the governing body of the city may, in its discretion, fix the number of members on the planning commission within the limitations set forth above. With respect to the third part of question 5, § 15-963 provides that members of the local planning commission shall be appointed by the governing body. Therefore, the mayor would not have the power to make these appointments.

With respect to the second paragraph of this question, it is not clear from the statute as to when an ordinance may be adopted changing the structure of the planning commission so as to increase or decrease the number of members. However, as I have pointed out, the present membership of the council is continued, or, in effect, frozen until the first regular meeting of the council in January, 1963. Any ordinance, therefore, that might be adopted prior to the first regular meeting in January, 1963, changing the number of members and the terms thereof, would have to contain a provision to the effect that it will become effective at the first regular meeting in January, 1963. It would seem that if the composition of the planning commission is to be changed, the ordinance should be adopted prior to the first meeting in 1963. Section 15-961.2 provides that "at that time any appointments or changes needed to conform any such commission or board to the requirements of this chapter: (Chapter 28) shall be made."

ZONING—Public Hearings—Two hearings mandatory before ordinance may be amended.

ORDINANCES—Amendment—Two public hearings mandatory for amending zoning ordinance.

HONORABLE H. SELWYN SMITH
Commonwealth's Attorney for Prince William County

September 27, 1962

This is in reply to your letter of September 25, 1962, which reads as follows:

"In 1962 the Legislature made considerable changes in the zoning laws of the State of Virginia insofar as the authority to act upon zoning by the several counties and municipalities. These changes have been the topic of many discussions which I have participated and the cause of much confusion. At a recent local government official conference at
Charlottesville, it would appear that there were several conflicting views among the Commonwealth Attorneys present as to what was intended and the effect upon the existing zoning ordinances in the counties that now have the same. With this in mind, my Board of Supervisors has asked questions which I am unable to answer, and I am asking for your opinion as to the following:

"1. Do amendments which the Board of Supervisors might desire to make to an ordinance, which was in effect in the county prior to the 1962 legislation, have to conform to the requirements of the legislation or do we continue to make those changes in accordance with the previous legislation?

"2. Is it necessary for the local zoning commission to hold public hearings on each amendment that they might be asked to report upon, or is its requirement for public meetings limited to the work of the commission when they are proposing a new ordinance, and is it also necessary for the governing body to hold a public hearing upon the same proposed amendment?"

I am of the opinion that any amendments to existing zoning ordinances which were in effect in a county prior to the effective date of Chapter 407, Acts of Assembly of 1962, may be amended pursuant to the terms of the new legislation only. Section 15-961.2 of the Code preserves and continues in effect existing planning commissions and boards of zoning appeals, as well as master plans adopted pursuant to prior Acts of Assembly. The last paragraph of that section of the Code reads as follows:

"The adoption of a comprehensive or master plan or any general development plans under the authority of prior acts is hereby validated and shall continue in effect until amended under the provisions of this chapter."

The statutory provisions relating to the zoning of counties and municipalities are now codified in Article 8, Chapter 28, Title 15 of the Code. Provision is made for the creation of zoning commissions in § 15-968.1 of the Code. The procedure for adoption of a zoning ordinance and amendments thereto is set forth in § 15-968.7 of the Code. That section reads as follows:

"The local commission of each county or municipality may, and at the direction of the governing body shall, prepare a proposed zoning ordinance including a map or maps showing the division of the territory into districts and a text setting forth the regulations applying in each district. The commission shall hold at least one public hearing on such proposed ordinance or any amendment of an ordinance, after notice as required by § 15-961.4, and may make appropriate changes in the proposed ordinance or amendment as a result of such hearing. Upon the completion of its work, the commission shall present the proposed ordinance or amendment including the district maps to the governing body together with its recommendations and appropriate explanatory materials.

"After June twenty-ninth, nineteen hundred and sixty-two, no zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local commission for its recommendations. Failure of the commission to report in sixty days or such shorter period as may be prescribed by the governing body shall be deemed approval.

"Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15-961.4, after which the governing body may make appropriate changes or corrections in the
ordinance or proposed amendment. An affirmative vote of at least a majority of the members of the governing body shall be required to adopt, amend or reenact a zoning ordinance.” (Italics supplied)

From the language which I have emphasized in the foregoing section, it is manifest that two public hearings are mandatory before a zoning ordinance may be amended by the governing body. Whether the local commission initiates the proposed amendment or the proposed amendment is referred by the governing body, the commission must hold at least one hearing on the proposed amendment before presenting the proposal to the governing body. Thereafter, the governing body must hold at least one public hearing before adopting the amendment.
**INDEX**

**OPINIONS**

**ATTORNEY GENERAL OF VIRGINIA**

1962-1963

<table>
<thead>
<tr>
<th>ACKNOWLEDGEMENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign State—Form acceptable...............................................</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ALCOHOLIC BEVERAGE CONTROL LAWS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Hours for Sale of Wine and Beer—How violations charged..........................</td>
<td>1</td>
</tr>
<tr>
<td>Storage of Beverage in Warehouse—When wholesale merchant's license tax applicable..........................</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ANNEXATION</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Officers—Effect of change of residence........................................</td>
<td>220</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARRESTS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Game Wardens—No authority to arrest person in possession of stolen boat</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ATTORNEYS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation in Criminal Cases—How paid when court appointed..............</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>BAIL</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Release on Personal Recognizance—May be transacted by telephone...............</td>
<td>5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>BANKRUPTCY</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Obligations for Hospital Care—Debt due State for mental care may be discharged........................................</td>
<td>125</td>
</tr>
<tr>
<td>Taxes not dischargeable—Penalty not considered as tax..........................</td>
<td>261</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>BANKS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Branches—When State Corporation Commission may authorize branch when parent located within limits of city, town or county........</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>BOARDS OF SUPERVISORS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority—Not authorized to file petition on behalf of property owners for correction of mistakes in reassessment........................................</td>
<td>276</td>
</tr>
<tr>
<td>Authority—To appropriate funds for secretarial help for court of record</td>
<td>45</td>
</tr>
<tr>
<td>Compensation—How determined..................................................</td>
<td>7</td>
</tr>
<tr>
<td>Compensation—Maximum for Loudoun County........................................</td>
<td>8</td>
</tr>
<tr>
<td>Meetings—Authority to hold executive sessions..................................</td>
<td>8</td>
</tr>
<tr>
<td>Members—Cannot be appointed as parole officers..................................</td>
<td>208</td>
</tr>
<tr>
<td>Members—Must reside in magisterial district......................................</td>
<td>221</td>
</tr>
<tr>
<td>Motions—Majority vote necessary................................................</td>
<td>216</td>
</tr>
<tr>
<td>No authority to hold advisory referendum.......................................</td>
<td>227</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CITIES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Appropriations—Authority to pay expense of purging registration books........</td>
<td>86</td>
</tr>
<tr>
<td>Colonial Heights Ordinance—Provision for sergeant and justice of peace construed........................................................................</td>
<td>9</td>
</tr>
<tr>
<td>Consolidation—Agreement between South Norfolk and Norfolk County...............</td>
<td>10</td>
</tr>
<tr>
<td>Council—How vacancies filled in City of Norton...................................</td>
<td>13</td>
</tr>
<tr>
<td>Disbursement of Funds—What officers to sign checks................................</td>
<td>14</td>
</tr>
<tr>
<td>Employees—Right-to-Work law not applicable to public employees..............</td>
<td>117</td>
</tr>
<tr>
<td>Leases—Authority of city to dispose of electrical facilities....................</td>
<td>14</td>
</tr>
</tbody>
</table>

319
REPORT OF THE ATTORNEY GENERAL

Planning Commission—Effect of Chapter 281 of Title 15 upon existing commission ............................................................... 314
Planning Commission—Two members may be appointed from governing body ................................................................. 16
Utility Taxes—Not to be assessed against insurance companies ................................................................. 284

CIVIL PROCEDURE
Garnishments—Commission to be paid for collection .......................................................... 101

CLERKS
Criminal Cases—Disposition of warrants ................................................................. 56
Deputies—Residence requirement .............................................................................. 16
 Destruction of Civil Warrants—When to be destroyed ............................................ 291
Duties Imposed by Selective Service Act—No longer applicable ......................... 17
Fees—Adoption Proceedings—Limited to $10.00, even though two children involved .......... 18
Fees—Collected from sale of hunting and fishing licenses ............................................ 18
Fees—Collection of transfer fees when land passes by will ........................................ 282
Fees—Condemnation Proceedings—When to be paid by petitioner ...................... 19
Recordation—Duty to docket judgment for alimony—Time for docketing .............. 20
Recordation—Duty to record judgment lien—Failure to record not a bar to marking judgment satisfied .............................................. 20
Recordation—Security Trust—When to be recorded ................................................. 21
Recordation—Where lunacy proceedings to be recorded .......................................... 127

COMMONWEALTH ATTORNEYS
Duty to Give Advice to Public Officials—No duty to represent sanitation authority, but may be employed ........................................... 22
Duty to prosecute violations of ordinance on appeal ................................................. 23

CONTRACTORS
Examination—Board may give written examination ................................................. 24
Examination—Not required in localities when registered with State Board .......... 24

COUNTRIES
Appropriations—Authority for participating in costs of industrial access highway ........................................................................... 103
Appropriations—Cannot supplement pay for special grand jury .................................... 25
Appropriations—Expenses of Sheriff—Responsibility ................................................. 244
Appropriations—General county funds may be used for industrial development ......... 25
Appropriations—Industrial development ..................................................................... 26
Appropriations—Lifesaving and first aid crew—When § 15-16.1 applies ................... 26
Appropriations—May not supplement game warden's salary ..................................... 96
Appropriations—No authority to participate in cost of airport ................................... 27
Appropriations—No authority to aid art gallery ......................................................... 28
Appropriations—No mandatory duty to install street lights ....................................... 28
Authority to Pay Damage for Poultry Killed by Dogs—When § 29-202 applicable ................ ................................................................. 69
Building Code—When applicable within Federal areas ............................................. 29
Cemeteries—Procedure for establishing ..................................................................... 309
Compensation of Agents to Issue Dog Licenses—No authority in board of supervisors to fix .................................................. 66
Contracts—May contract for insurance with company having employee as member of electoral board ................................................. 219
Executive Secretaries—Effect of appointment upon clerk of the county.................... 29
REPORT OF THE ATTORNEY GENERAL

Page

Fire Laws—No authority in county to parallel State law.......................... 89
Game Laws—No authority in counties to enforce....................................... 98
Land Acquisition—No authority to participate in “open land program”........ 30
Land—Maximum property owned—Sanitary district...................................... 31
Magisterial Districts—Authority of board to create obligation within one
magisterial district for schools........................................................................ 233
Magisterial Districts—How division to be described.................................... 32
Ordinances—Driving under influence may parallel State law—Minimum
fine must be $200.00..................................................................................... 144
Ordinances—Imposing motor vehicle license tax under § 15-8—Not less
than sixty days must elapse between introduction and adoption................. 33
Ordinances—No authority to adopt implied consent law................................ 149
Ordinances—No authority to enact criminal ordinances, such as contribu-
ting to the delinquency of a minor.......................................................... 34
Ordinances—Regulation of trailer camps..................................................... 289
Sanitary Districts—County may participate in cost to extent of services
utilized by county.......................................................................................... 35
Sanitary Districts—Highways—No authority for county to construct
secondary system of highways...................................................................... 104
Sidewalks Within Towns—No authority for board of supervisors or
school board to contribute to cost of construction......................................... 107
Street Lights in Subdivisions—County may pay for lights—No authority
to assess residents for service...................................................................... 36
Tax Levies—When special levy may be expended for general purposes
of trailer lots.................................................................................................... 265
Trailer Camps—No authority for county to prescribe minimum number
of trailer lots..................................................................................................... 288

COUNTIES, CITIES AND TOWNS

Acquisition of Property for Trash Dumps—No authority for county
and town to enter joint venture................................................................. 36
Banks—When branches may be authorized.................................................. 6
Consolidation—Effect upon commissions previously appointed..................... 37
Consolidation—Referendum—When question to be submitted to people

COURTS

Costs—When Commonwealth liable for fees.............................................. 39
County Court Jurisdiction—Extends throughout county............................. 185
Jurisdiction—Probate of wills—Place of residence determines....................... 40
Juvenile and Domestic Relations—Not considered as municipal courts
—Not required to file warrants with clerk of court of record........................ 41
Office—Towns not authorized to provide office for circuit judge..................... 287

COURTS NOT OF RECORD

§ 16.1-97 not applicable to criminal cases.................................................... 42
Expenses—When to be borne by county...................................................... 42
Expenses—When to be borne by State.......................................................... 43
No authority for adjudging competency for purposes of § 46.1-427 of
the Code...................................................................................................... 127

COURTS OF LIMITED JURISDICTION

Jurisdiction—May hold preliminary hearings in felony cases and con-
vene commissions for commitment of mentally ill....................................... 44
Jurisdiction—To try warrants issued by Justice of the Peace of the county ......................................................... 45

COURTS OF RECORD
Secretarial Help—Board of Supervisors may appropriate funds................. 45

CRIMES
Burning with Intent to Injure Insurer—Automobile constitutes chattel 46
Concealed Weapon—County dog warden may carry without permit............. 47
Contributing to Delinquency—Responsibility of parent.......................... 48
Cursing or Being Drunk in Public—”Age of discretion” varies with circumstances ......................................................... 48
Larceny—Personal property pledged as security for loan.......................... 49
Operating Uninsured Motor Vehicle Not Registered in Virginia—Not a violation under §§ 46.1-167.1 and 46.1-167.3........................................ 197
Reckless Driving—Exceeding speed limit of 65 mph—To what vehicles applicable ......................................................... 188
Reckless Driving and Manslaughter—When criminal negligence necessary 50
Sale of Toy Firearms—Not applicable to pistols used to shoot blanks ......... 51
Shooting in Road—When § 33-278 applicable.......................... 107
Sunday Closing Law—Construction of pipeline.......................... 51

CRIMINAL PROCEDURE
§ 16.1-97 not applicable to criminal cases......................................................... 42
Arrest—Duty of officer............................................................................... 133
Attorney's Fee—No provision for reimbursing acquitted defendant............ 52
Bail—Bond for appeal when no bail previously granted.......................... 52
Bail—Bonds—Where to be given and acknowledged................................ 5
Bail—Justice of the Peace authorized to fix penalty.................................. 112
Blood Analysis—Certificate of Medical Examiner admissible in evidence in drunk driving case over objection of accused.......................... 167
Blood Analysis—Cost of analysis—Authority of Justice of Peace under
§ 18.1-55........................................................................................................ 135
Blood Analysis—Effect of failure to show return address of court on blood sample ......................................................... 147
Blood Analysis—Implied Consent—Procedure for taking blood sample discussed ......................................................... 152
Blood Analysis—Implied Consent—Venue of offenses and effect of fail-
ure to comply with § 18.1-55 of Code.......................................................... 159
Blood Analysis—Offense for refusing test to be tried separately from
offense of drunk driving............................................................................ 165
Blood Analysis—Procedure under § 18.1-55 of Code—Duties of clerk 166
Confessions—No duty to furnish defense counsel with copy.................... 53
Confessions—No duty upon officer to discuss evidence with defense counsel before preliminary hearing.......................... 54
Costs—Defendant not required to pay for summoning witnesses when acquitted ......................................................... 246
Costs—Fees for court-appointed attorneys.................................................. 4
Costs—Physicians fee for examination of prisoners.................................. 54
Costs—Source of payment in implied consent cases.................................. 143
Costs—Travel expense for transporting prisoners to hospital.................. 56
Costs—When medical examiners entitled to fees and expenses............... 304
Disposition of Warrants............................................................................ 56
Evidence—Admissibility of certificate of chief medical examiner—§
18.1-56 applied............................................................................................ 134
Evidence—Blood Analysis—Admissibility of hospital records................. 138
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence—Blood Analysis—Effect of broken container</td>
<td>158</td>
</tr>
<tr>
<td>Evidence—Blood Analysis—Effect of defendant’s failure</td>
<td>145</td>
</tr>
<tr>
<td>Evidence—Blood Analysis—Effect of variance in results of</td>
<td>156</td>
</tr>
<tr>
<td>blood sample analysis</td>
<td></td>
</tr>
<tr>
<td>Evidence—Implied Consent Law not applicable to motorboat</td>
<td>150</td>
</tr>
<tr>
<td>offenses</td>
<td></td>
</tr>
<tr>
<td>Fine and Costs—When to be released</td>
<td>58</td>
</tr>
<tr>
<td>Fines—Collection by courts of limited jurisdiction</td>
<td>58</td>
</tr>
<tr>
<td>Motor Vehicle Operator’s License—Operating during period</td>
<td>184</td>
</tr>
<tr>
<td>of revocation—Accused must have notice of revocation</td>
<td></td>
</tr>
<tr>
<td>Preliminary Hearing</td>
<td>60</td>
</tr>
<tr>
<td>Prior Convictions—When admissible</td>
<td>169</td>
</tr>
<tr>
<td>Search Warrant—Not issued for search of person</td>
<td>61</td>
</tr>
<tr>
<td>Search Warrant—When to be executed</td>
<td>62</td>
</tr>
<tr>
<td>Search Warrant—Authority to issue warrant to search</td>
<td>62</td>
</tr>
<tr>
<td>person</td>
<td></td>
</tr>
<tr>
<td>Violation of Game Laws—How prior convictions to be</td>
<td>97</td>
</tr>
<tr>
<td>proved</td>
<td></td>
</tr>
<tr>
<td>Witnesses—Justice of Peace not competent to testify on</td>
<td>163</td>
</tr>
<tr>
<td>trial of person refusing blood test</td>
<td></td>
</tr>
<tr>
<td>Writ of Capias Pro Fine—Who is responsible to commit</td>
<td>62</td>
</tr>
<tr>
<td>defendant to jail</td>
<td></td>
</tr>
<tr>
<td>DEEDS OF TRUST</td>
<td></td>
</tr>
<tr>
<td>Release—Marginal release by holder in due course—How</td>
<td>63</td>
</tr>
<tr>
<td>signed in deed book</td>
<td></td>
</tr>
<tr>
<td>DEPOSITS AND DEPOSITORIES</td>
<td></td>
</tr>
<tr>
<td>Banks—§ 58-94 applicable to moneys received in capacity</td>
<td>64</td>
</tr>
<tr>
<td>of paying agent</td>
<td></td>
</tr>
<tr>
<td>Time Deposits—Public funds not to be invested beyond</td>
<td>64</td>
</tr>
<tr>
<td>statutory limits</td>
<td></td>
</tr>
<tr>
<td>DIVORCE</td>
<td></td>
</tr>
<tr>
<td>Validity of Mexican divorce</td>
<td>65</td>
</tr>
<tr>
<td>DOG LAWS</td>
<td></td>
</tr>
<tr>
<td>Dog Warden—May carry concealed weapon</td>
<td>47</td>
</tr>
<tr>
<td>License Fees—Special fund—Not affected by employment of</td>
<td>66</td>
</tr>
<tr>
<td>county dog warden except for amount formerly due State</td>
<td></td>
</tr>
<tr>
<td>License—Board of supervisors may not fix compensation of</td>
<td>66</td>
</tr>
<tr>
<td>agents to issue dog licenses</td>
<td></td>
</tr>
<tr>
<td>Licenses—Who to collect when city has tax collector</td>
<td>67</td>
</tr>
<tr>
<td>Ordinances—Authority of county to require vaccination</td>
<td>68</td>
</tr>
<tr>
<td>against rabies</td>
<td></td>
</tr>
<tr>
<td>Poultry Killer—Dog may be killed when caught in act of</td>
<td>68</td>
</tr>
<tr>
<td>killing poultry</td>
<td></td>
</tr>
<tr>
<td>Poultry Killer—When damages may be paid by board of</td>
<td>69</td>
</tr>
<tr>
<td>supervisors</td>
<td></td>
</tr>
<tr>
<td>ELECTIONS</td>
<td></td>
</tr>
<tr>
<td>Absentee Ballots—Candidates prohibited from notarizing</td>
<td>70</td>
</tr>
<tr>
<td>or witnessing ballot</td>
<td></td>
</tr>
<tr>
<td>Absentee Ballots—Last day for filing applications</td>
<td>70</td>
</tr>
<tr>
<td>Ballots—Expense of printing</td>
<td>71</td>
</tr>
<tr>
<td>Bond Referendum—Qualified voters—Cannot exclude</td>
<td>72</td>
</tr>
<tr>
<td>non-freeholders</td>
<td></td>
</tr>
<tr>
<td>Candidates—County office candidates not required to file</td>
<td>73</td>
</tr>
<tr>
<td>notice State Board of Elections</td>
<td></td>
</tr>
<tr>
<td>Candidates for Office—Cannot qualify unless capitation</td>
<td>73</td>
</tr>
<tr>
<td>taxes paid</td>
<td></td>
</tr>
<tr>
<td>Capitation Taxes—Candidate for office must have paid</td>
<td>73</td>
</tr>
<tr>
<td>taxes in order to qualify</td>
<td></td>
</tr>
<tr>
<td>Capitation Taxes—Exemptions—Members of active reserve not</td>
<td>74</td>
</tr>
<tr>
<td>considered in active service</td>
<td></td>
</tr>
</tbody>
</table>
### Capitation Taxes
- Person becoming twenty-one years of age on January first ........................................ 75

### Election Judge
- Member of school board may not be appointed...................................................... 75

### Electoral Boards
- Political party recommendations not required......................................................... 76

### Party Plans
- Who determines procedure...................................................................................... 76

### Primary
- Candidates—Authority to withdraw........................................................................ 77
- Candidacies and voter qualifications—Challenges................................................. 78
- Capitation Tax—Deadline for payment.................................................................... 79
- Capitation Taxes—Registration of new residents..................................................... 80
- Changes—Clerks of elections—Who entitled to appointment.................................. 81
- Committee for political parties............................................................................. 81
- Must be conducted pursuant to statute—No duty on State Board to prevent illegal primary election................................................................. 83
- Republican Preferential Primary—Winners have no legal standing if primary not conducted according to law......................................................... 84
- When run-off election permissible........................................................................ 84

### Registration Books
- Expense of purging—City may appropriate necessary funds................................. 86

### Registration
- New residents........................................................................................................ 80

### Residence
- How determined...................................................................................................... 87
- When voting precincts changed............................................................................. 87

### Special
- When Treasurer required to prepare list of registered voters.............................. 89

### FIRE LAWS
- County Regulation—No authority for counties to parallel State law.................. 89

### GAME AND INLAND FISHERIES
- Closed Season—Lawful for certain people to hunt rabbits and squirrels—"Immediate family" defined.......................................................... 90
- Deer and Bear—Relief for landowner suffering damages from big game........ 91
- Deer and Bear Damage Fund—How to be expended............................................. 91
- Deer and Bear Stamp Fund—Commissions for selling stamps.......................... 93
- Deer and Bear Stamp Fund—Disposition of funds accumulated......................... 94
- Dogs Killing Poultry—May be killed when caught in the act................................ 68
- Fishing on Sunday—Prohibited in Highland County.............................................. 94
- Fish Traps—When dip net permit required............................................................ 95
- Game Wardens—No authority to arrest one in possession of stolen boat........... 4
- Game Wardens—Salary not to be supplemented by county............................... 96
- License Fees—Agents appointed for collection.................................................... 18
- License—Revocation for two convictions—How prior conviction brought to attention of court................................................................. 97
- License Revocation—Two violations within two years......................................... 98
- Local Regulation—No authority in counties to enforce game laws................... 98
- Seasons and Bag Limits—Statutes and regulations applicable to Smyth County.. 99
- Trout Fishing—When license necessary............................................................... 100

### GARNISHMENTS
- Commissions ........................................................................................................... 101

### HEALTH
- Mattresses Loaned to Indigent Hospital Inmates—§ 32-119 of Code inapplicable .. 102
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Water Supply—Discharge of offensive drainage into source</td>
<td>294</td>
</tr>
<tr>
<td>Restaurant—College fraternity house not included</td>
<td>103</td>
</tr>
<tr>
<td><strong>HIGHWAYS</strong></td>
<td></td>
</tr>
<tr>
<td>Condemnation—Certificates of deposit—When petitioner to pay fees</td>
<td>19</td>
</tr>
<tr>
<td>Industrial Access—Authority of county to participate</td>
<td>103</td>
</tr>
<tr>
<td>Local Control—No conflict between State highway laws and sanitary district laws</td>
<td>104</td>
</tr>
<tr>
<td>Outdoor Advertising—Signs within right of way limits prohibited</td>
<td>106</td>
</tr>
<tr>
<td>Shooting in Road—When § 33-278 applicable</td>
<td>107</td>
</tr>
<tr>
<td>Sidewalks—No authority for school board to contribute to cost of construction</td>
<td>107</td>
</tr>
<tr>
<td>Toll Revenue Bonds—When tolls to be removed</td>
<td>108</td>
</tr>
<tr>
<td><strong>HOUSING</strong></td>
<td></td>
</tr>
<tr>
<td>National Housing Act—Authority for local housing authorities to participate in Federal program</td>
<td>110</td>
</tr>
<tr>
<td>National Housing Act—Local housing authorities—Persons entitled to lease facilities</td>
<td>110</td>
</tr>
<tr>
<td><strong>INDUSTRIAL DEVELOPMENT</strong></td>
<td></td>
</tr>
<tr>
<td>Division of Industrial Development and Planning—Functions</td>
<td>250</td>
</tr>
<tr>
<td><strong>JUDGES</strong></td>
<td></td>
</tr>
<tr>
<td>Compatibility of Office—May not serve as county tie breaker</td>
<td>209</td>
</tr>
<tr>
<td>Retirement—Election to receive “last-survivor annuity”—not retroactive to judges retiring before effective date of legislative act</td>
<td>111</td>
</tr>
<tr>
<td>Substitutes—Serve for same term as principal when city charter makes no express term</td>
<td>112</td>
</tr>
<tr>
<td><strong>JUDGMENTS</strong></td>
<td></td>
</tr>
<tr>
<td>Satisfied—Right of debtor to have judgment marked satisfied</td>
<td>20</td>
</tr>
<tr>
<td><strong>JUSTICE OF PEACE</strong></td>
<td></td>
</tr>
<tr>
<td>Authority—Issuing warrants for violation of town ordinance</td>
<td>45</td>
</tr>
<tr>
<td>Bail Bond—Officer may fix the penalty</td>
<td>112</td>
</tr>
<tr>
<td>Search Warrants—No authority to issue to search a person for stolen property</td>
<td>62</td>
</tr>
<tr>
<td><strong>JUVENILE AND DOMESTIC RELATIONS COURTS</strong></td>
<td></td>
</tr>
<tr>
<td>Investigations—When report to be filed</td>
<td>113</td>
</tr>
<tr>
<td>Jurisdiction—Custody proceeding of child before divorce order entered</td>
<td>114</td>
</tr>
<tr>
<td>Term of Office—Distinguished from tenure in office</td>
<td>115</td>
</tr>
<tr>
<td><strong>JUVENILES</strong></td>
<td></td>
</tr>
<tr>
<td>Abandoned Child—Disposition if juvenile court closed</td>
<td>115</td>
</tr>
<tr>
<td>Motor Vehicle Operator’s License—Failure to revalidate while under the age of eighteen</td>
<td>182</td>
</tr>
<tr>
<td><strong>LABOR</strong></td>
<td></td>
</tr>
<tr>
<td>Acts Designed to Injure Trade or Business—§ 59-21.1 construed</td>
<td>116</td>
</tr>
<tr>
<td>Unions—Cities not required to negotiate</td>
<td>117</td>
</tr>
<tr>
<td><strong>LOTTERIES</strong></td>
<td></td>
</tr>
<tr>
<td>Consideration—What constitutes</td>
<td>119</td>
</tr>
<tr>
<td>Forfeiture—Disposition of proceeds</td>
<td>120</td>
</tr>
</tbody>
</table>
MAYORS
Salary—Limit for Town of St. Paul............................................................ 120

MENTAL HYGIENE AND HOSPITALS
Admissions—How residence of child determined........................................ 121
Admissions—Residence of minor—How determined...................................... 121
Cost of Maintenance—Board not authorized to deduct from patient’s private deposits................................................................. 123
Discharge—Effect of voluntary readmission.............................................. 124
Expense for Maintenance—Obligation may be discharged in bankruptcy 125

MENTALLY ILL
Commitment—Fee of physician limited to $10.00....................................... 126
Commitment for Observation—No authority to commit to private institution .................................................................................. 126
Jurisdiction to Determine Competency—No authority in county court.... 127
Recordation of Proceedings............................................................................ 127
Sterilization—Mental illness must be hereditary..................................... 256

MOTORBOATS
Blood Analysis—Implied Consent—Not applicable to persons operating motorboats................................................................. 150
Registration—No provision for refunding fees........................................ 129

MOTOR VEHICLES
Accident Report—Not required for accident occurring on private property .......................................................... 130
Accident Report—Obligation to file when accident occurs in parking lot 132
Arrest by Members of State Police—Procedure.......................................... 133
Blood Analysis—Certificate of chief medical examiner admissible in evidence in any criminal proceeding................................. 134
Blood Analysis—Cost of blood analysis and authority of Justice of the Peace under § 18.1-55 of the Code...................................................... 135
Blood Analysis—Implied Consent—§ 18.1-55 construed............................. 137
Blood Analysis—Implied Consent—Admissibility of hospital records to establish compliance.......................................................... 138
Blood Analysis—Implied Consent—Cost of obtaining laboratory test........ 141
Blood Analysis—Implied Consent—Costs—Source of payment................. 143
Blood Analysis—Implied Consent—Counties not authorized to parallel State law................................................................. 144
Blood Analysis—Implied Consent—Effect of inability of physician to obtain sample................................................................. 144
Blood Analysis—Implied Consent—Failure of defendant to produce his sample .................................................................................. 145
Blood Analysis—Implied Consent—Failure to show return address of court on sample ................................................................. 147
Blood Analysis—Implied Consent—Fees may be required before making analysis—Procedure when accused is indigent.................. 148
Blood Analysis—Implied Consent—Localities may not adopt parallel law 149
Blood Analysis—Implied Consent—Not applicable to persons operating motorboats ................................................................. 150
Blood Analysis—Implied Consent—Person authorized to withdraw sample .................................................................................. 150
Blood Analysis—Implied Consent—Person refusing to submit to test assessible for costs in prosecution ......................................................... 151
Blood Analysis—Implied Consent—Procedure to be employed in taking sample ................................................................. 152
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blood Analysis—Implied Consent—Refusal to take test—When justified</td>
<td>153</td>
</tr>
<tr>
<td>—Right to prosecute on basis of other evidence</td>
<td></td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—Refusal to submit to test...</td>
<td>154</td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—Time within which blood test to be</td>
<td></td>
</tr>
<tr>
<td>made</td>
<td></td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—Variance in result of analysis</td>
<td>156</td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—When analysis admissible in evidence</td>
<td></td>
</tr>
<tr>
<td>—Effect of broken container</td>
<td></td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—When applicable, venue for offenses</td>
<td></td>
</tr>
<tr>
<td>and failure to comply with § 18.1-55</td>
<td>159</td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—Who to explain law to accused</td>
<td>162</td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—Witnesses—Justice of Peace not</td>
<td></td>
</tr>
<tr>
<td>competent to testify on refusal to submit to test</td>
<td></td>
</tr>
<tr>
<td>Blood Analysis—Implied Consent—Written consent for blood test not</td>
<td></td>
</tr>
<tr>
<td>necessary</td>
<td></td>
</tr>
<tr>
<td>Blood Analysis—Offense for refusing test to be tried separately from</td>
<td></td>
</tr>
<tr>
<td>offense of drunk driving</td>
<td>165</td>
</tr>
<tr>
<td>Blood Analysis—Procedure under § 18.1-55 of Code—Duties of clerk</td>
<td>166</td>
</tr>
<tr>
<td>Blood Analysis—When certificate admissible—Failure of accused to pay</td>
<td></td>
</tr>
<tr>
<td>costs of analysis</td>
<td>167</td>
</tr>
<tr>
<td>Carriers of Property—Rates fixed by I.C.C.—Federal legislation to</td>
<td></td>
</tr>
<tr>
<td>remove bulk items from minimum rate not discriminatory</td>
<td>168</td>
</tr>
<tr>
<td>Criminal Penalties—Admissibility of prior convictions</td>
<td>169</td>
</tr>
<tr>
<td>Fuel Carrier—When lettering required on vehicle</td>
<td>170</td>
</tr>
<tr>
<td>Licenses—For Hire—Not required for vehicles owned by producer of</td>
<td>171</td>
</tr>
<tr>
<td>asphalt delivering his own property from his regular place of business</td>
<td></td>
</tr>
<tr>
<td>Licenses—Public use of tag—When permissible</td>
<td>172</td>
</tr>
<tr>
<td>Licenses—Revocation—Localities not authorized to impose penalty for</td>
<td></td>
</tr>
<tr>
<td>operation without license</td>
<td>173</td>
</tr>
<tr>
<td>Licenses—Revocation—When license suspended under § 46.1-442 to be</td>
<td>174</td>
</tr>
<tr>
<td>reissued</td>
<td></td>
</tr>
<tr>
<td>Licenses—Truck registered and licensed under § 46.1-154 for highway</td>
<td>175</td>
</tr>
<tr>
<td>use—Subject to violation of § 46.1-159 while used upon highways for</td>
<td></td>
</tr>
<tr>
<td>agricultural purposes</td>
<td></td>
</tr>
<tr>
<td>Licenses—Trucks transporting asphalt—When “for hire” license not</td>
<td>171</td>
</tr>
<tr>
<td>required—§§ 46.1-1(35) and 56-275.1</td>
<td></td>
</tr>
<tr>
<td>Licenses—When service personnel subject to county license tax—When</td>
<td>177</td>
</tr>
<tr>
<td>exempt under Soldiers’ and Sailors’ Civil Relief Act</td>
<td></td>
</tr>
<tr>
<td>Local License—Automobile Dealers</td>
<td>178</td>
</tr>
<tr>
<td>Local License—Locality may not require evidence of payment of all</td>
<td></td>
</tr>
<tr>
<td>personal property tax</td>
<td>179</td>
</tr>
<tr>
<td>Local License—Not applicable within Federal reservations</td>
<td>179</td>
</tr>
<tr>
<td>Local License—When applicable within Federal areas</td>
<td>179</td>
</tr>
<tr>
<td>Local Licenses—When applicable within Federal reservation</td>
<td>180</td>
</tr>
<tr>
<td>Local Licenses—When counties authorized to tax service personnel</td>
<td>177</td>
</tr>
<tr>
<td>Local License—When required of military personnel</td>
<td>181</td>
</tr>
<tr>
<td>Operator's License—Failure of person under eighteen to have license</td>
<td></td>
</tr>
<tr>
<td>revalidated—Effect after reaching eighteen years of age</td>
<td>182</td>
</tr>
<tr>
<td>Operator's License—Falsifying application—§ 46.1-357 construed</td>
<td>183</td>
</tr>
<tr>
<td>Operator's License—No abatement of mandatory suspension under § 46.1</td>
<td>186</td>
</tr>
<tr>
<td>1-423</td>
<td></td>
</tr>
<tr>
<td>Operator's License—Operation during period of revocation—Accused</td>
<td></td>
</tr>
<tr>
<td>must have notice of revocation</td>
<td>184</td>
</tr>
<tr>
<td>Operator's License—Original of license issued to person under</td>
<td></td>
</tr>
<tr>
<td>eighteen to be mailed to county court judge</td>
<td>185</td>
</tr>
<tr>
<td>Operator's License—Suspension for reckless driving (exceeding 65 or</td>
<td>186</td>
</tr>
<tr>
<td>75)—§ 46.1-423 mandatory</td>
<td></td>
</tr>
<tr>
<td>Operator's License—When restored to person committed to mental institution</td>
<td>Page 124</td>
</tr>
<tr>
<td>---------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Personal Property—Assessable by Commissioner of the Revenue when unreported by resident of locality—§ 58-838</td>
<td>Page 274</td>
</tr>
<tr>
<td>Radar—Equipment must be tested at each location</td>
<td>Page 305</td>
</tr>
<tr>
<td>Radar—Unlawful use under § 46.1-198.1 not grounds for confiscating such devices</td>
<td>Page 187</td>
</tr>
<tr>
<td>Reciprocity—When applicable</td>
<td>Page 187</td>
</tr>
<tr>
<td>Reckless Driving—Criminal negligence not required</td>
<td>Page 50</td>
</tr>
<tr>
<td>Reckless Driving—Exceeding speed limit of 65 mph—to what vehicles applicable</td>
<td>Page 188</td>
</tr>
<tr>
<td>Registration and Licensing—No exemption under § 46.1-45 for truck registered and licensed for non-agricultural purposes</td>
<td>Page 175</td>
</tr>
<tr>
<td>Registration—Leased vehicles</td>
<td>Page 190</td>
</tr>
<tr>
<td>Registration—Reciprocity—When applicable</td>
<td>Page 191</td>
</tr>
<tr>
<td>Seat Belts—Must be installed on 1963 models irrespective of year sold</td>
<td>Page 196</td>
</tr>
<tr>
<td>Taxation—Mobile homes to be taxed as personal property</td>
<td>Page 271</td>
</tr>
<tr>
<td>Uninsured Motorists—Operating under temporary license</td>
<td>Page 196</td>
</tr>
<tr>
<td>Uninsured Motor Vehicle Fee—Becomes payable upon registration of uninsured motor vehicle in Virginia—§§ 46.1-167.1 and 46.1-167.3</td>
<td>Page 197</td>
</tr>
<tr>
<td>Weight Violations—Liquidated damages to be assessed for over-axel violation as well as over-gross limit</td>
<td>Page 198</td>
</tr>
</tbody>
</table>

NEWSPAPERS
| Legal Advertisement—Where to be published | Page 199 |

NURSES
| Advisory Council on Nursing Training—Meetings—Necessary to meet at least once annually—Calendar Year | Page 199 |

ORDINANCES
| Amendment—Two public hearings mandatory for amending zoning ordinance | Page 315 |
| Counties—Motor vehicle license tax under § 15-8—Not less than sixty days must elapse between introduction and adoption | Page 33 |
| County ordinance applicable within town | Page 200 |
| Dog Vaccination—Who to perform vaccination | Page 68 |
| Motor Vehicles—Cities not authorized to impose penalty for operating motor vehicle after license revocation | Page 173 |
| Zoning—Effect of repeal of statute requiring referendum to amend ordinance | Page 311 |

PHYSICIANS AND SURGEONS
| Sterilization—Operation must be explained by physician or surgeon performing vasectomy or salpingectomy | Page 257 |

PINE TREE SEED LAW
| Not applicable within cities | Page 200 |
| Reserving Number of Trees—Alternative management plan—Effect of violation of contract | Page 201 |

PROFESSIONAL AND OCCUPATIONAL REGISTRATION
| Architects—Landscape architect not to be distinguished | Page 202 |
| Hairdressers—Formal training—Board may recognize foreign schools | Page 204 |
| Opticians—Advertising | Page 205 |
REPORT OF THE ATTORNEY GENERAL

Real Estate Commission—Examination—Authority to provide waiting period .......................................................... 206
Real Estate Commission—No authority to expend funds to establish chair for real estate education at University of Virginia ............. 207

PUBLIC FUNDS
Deposits—§ 58-944 applicable to moneys received in capacity of paying agent ....................................................................... 64

PUBLIC OFFICERS
Abolition of Office—Effect of consolidation of city and county upon existing commissions ......................................................... 37
Clerks—No authority to appoint deputy residing in another jurisdiction......................................................................................... 16
Compatibility—Board of supervisors—May not be appointed as parole officer ........................................................................... 208
Compatibility—Commissioner of Accounts and Registrar—Clerk of county court and registrar......................................................... 208
Compatibility—County judge may not serve as tie breaker ................................................................................................................. 209
Compatibility—Employee of county school board as member of city council ...................................................................................... 210
Compatibility—Employee of United States may be Justice of Peace.................................................................................................... 210
Compatibility—Employee of United States may not serve on town council—Certain exceptions .......................................................... 211
Compatibility—Employee of United States government as town officers ............................................................................................ 212
Compatibility—Justice of Peace as clerk in local post office ............................................................................................................. 212
Compatibility—Member of Council of City of Portsmouth and Tidewater Airport Commission .......................................................... 213
Compatibility—Member of school board may not serve as election judge .............................................................................................. 75
Compatibility—Member of welfare board may serve on county re-assessment board ........................................................................ 214
Compatibility—Registrar—Not to be elected mayor ................................................................................................................................. 71
Contracts—City Council—Members may not contract with school board for insurance coverage .......................................................... 214
Contracts—Member of board of supervisors cannot share in proceeds from insurance contracts ................................................................ 215
Contracts—Member of board of supervisors furnishing supplies to county ......................................................................................... 216
Contracts—School board not to purchase supplies from firm in which Commonwealth's Attorney is interested .................................. 218
Contracts—School Trustee Electoral Board—Member cannot have interest in contracts of insurance on county-owned buildings ...................................................... 218
Contracts—Secretary of Electoral Board—Insurance contracts with county ......................................................................................... 219
Deputies—Tenure of office ceases upon termination of principal's term ............................................................................................... 290
Eligibility—No prohibition against State employee holding political office .......................................................................................... 248
Police—No duty to respond to all ambulance calls ............................................................................................................................... 219
Residence—Effect of annexation .................................................................................................................................................................... 220
Residence—Member of board of supervisors must reside in magisterial district ................................................................................... 221
Salaries—No authority in governing body to fix salaries of deputies of Commissioner of the Revenue and Treasurer ............................................ 222
Term of Office—Tenure in office distinguished ................................................................................................................................. 115
Terms of Office—Vacancies ................................................................................................................................................................. 224
Vacancies—City Council—How filled in City of Norton ....................................................................................................................... 13
### PUBLIC RECORDS

Minutes of school board meetings.................................................. 234
School Board Contracts—Right of public to examine..................... 237

### RECORADATION

Copies—Questionable as to right to record.................................. 225
Judgment Lien Docket—When clerk to record................................ 225
Subdivision Plats—When recordation prohibited............................ 258

### SCHOOLS

Appropriations—School board must present estimate of contemplated expenditures ........................................................................................................ 225
Bonds—County Bonds—When referendum necessary............................. 226
Bonds—County Obligation—When referendum necessary..................... 227
Bonds—No authority for board of supervisors to hold referendum...... 227
Bus Driver—Age—Must be between sixteen and sixty-five at time of contract .................................................................................................................. 228
Compulsory Attendance—“Neglected child” provision not applicable unless locality adopts attendance law................................................................. 228
Compulsory Attendance—When child to be excused............................ 229
Contracts—Authority of county.......................................................... 230
Contracts—Competitive bidding not required unless State-aid project involved ........................................................................................................... 231
Contracts—Revisions........................................................................... 231
Land Acquisition—School board not authority to purchase land for which unsecured notes are given in payment................................................................. 232
Magisterial Districts—Authority of board of supervisors to levy tax on magisterial district ......................................................................................... 233
School Boards—Appropriations—No authority to supplement teacher retirement ........................................................................................................ 234
School Boards—Immunity from tort liability........................................ 285
School Boards—May not place insurance coverage with member of city council ........................................................................................................ 214
School Boards—Not to purchase supplies from Commonwealth’s Attorney ............................................................................................................. 218
School Boards—Public Records—Minutes of meetings....................... 234
School Property—Land lying partly in town—How boundary to be changed .................................................................................................................. 237
Teachers—Right of citizen to examine contracts................................. 237
Transportation—When cost to private schools may be paid by government .................................................................................................................. 238
Transportation—When public funds may be used............................... 239
Trustee Electoral Board—Members may not contract with county for insurance coverage .......................................................................................... 218
Tuition—Children of war veterans...................................................... 240
Tuition—When reduced fees for State residents applicable.................. 240
Tuition—Who entitled to reduced fees.................................................. 241
Tuition Grants—Applicability to city residents attending county schools... 241

### SHERIFFS AND SERGEANTS

Authority of city sergeant to execute criminal process outside city...... 242
Deputies—Faithful Performance Bonds—Principal determines if deputies are to provide bonds.............................................................................. 243
Execution of Writ of Possession in Unlawful Detainer—No duty to personally remove property ...................................................................................... 243
Expenses—When county may participate............................................ 244
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>REPORT OF THE ATTORNEY GENERAL</strong></td>
<td></td>
</tr>
<tr>
<td>Fees and Commissions—Applicable statute—When commission to be</td>
<td>245</td>
</tr>
<tr>
<td>paid for conducting sale</td>
<td></td>
</tr>
<tr>
<td>Fees—Defendant not required to pay for summoning witnesses when</td>
<td>246</td>
</tr>
<tr>
<td>acquitted</td>
<td></td>
</tr>
<tr>
<td>Hours of Work</td>
<td>247</td>
</tr>
<tr>
<td>Sergeant of the City of Franklin—Authority to execute process beyond</td>
<td></td>
</tr>
<tr>
<td>corporate limits</td>
<td></td>
</tr>
<tr>
<td><strong>STATE EMPLOYEES</strong></td>
<td>248</td>
</tr>
<tr>
<td>No Prohibition Against Holding Political Office</td>
<td></td>
</tr>
<tr>
<td><strong>STATE INSTITUTIONS</strong></td>
<td>249</td>
</tr>
<tr>
<td>Claims for Tuition—How to be discharged</td>
<td></td>
</tr>
<tr>
<td>Division of Industrial Development and Planning—May perform</td>
<td>250</td>
</tr>
<tr>
<td>functions previously performed by Department of Conservation and</td>
<td></td>
</tr>
<tr>
<td>Economic Development</td>
<td></td>
</tr>
<tr>
<td>Immunity for tort liability</td>
<td>285</td>
</tr>
<tr>
<td>Insurance—Saving in premiums effected by Bureau of Property, Records</td>
<td>252</td>
</tr>
<tr>
<td>and Insurance must be paid into State Insurance Reserve Trust Fund</td>
<td></td>
</tr>
<tr>
<td>Real Estate—Easements—State responsible for damage caused to sewer</td>
<td>253</td>
</tr>
<tr>
<td>line equipment in easement through State-owned lands</td>
<td></td>
</tr>
<tr>
<td>Richmond Professional Institute—Relationship to Citizens' Foundation</td>
<td>254</td>
</tr>
<tr>
<td>of the Richmond Professional Institute, Incorporated</td>
<td></td>
</tr>
<tr>
<td><strong>STATE SEAL</strong></td>
<td>255</td>
</tr>
<tr>
<td>Use of Facsimile—Not prohibited on badges of private security guards</td>
<td></td>
</tr>
<tr>
<td><strong>STATUTE OF LIMITATIONS</strong></td>
<td>249</td>
</tr>
<tr>
<td>State Educational Institutions—§ 8-35 of Code applies</td>
<td></td>
</tr>
<tr>
<td><strong>STERILIZATION</strong></td>
<td>256</td>
</tr>
<tr>
<td>Mentally Deficient—When mental disease must be hereditary</td>
<td></td>
</tr>
<tr>
<td>Vasectomy or Salpingectomy—Explanation to be given by physician</td>
<td>257</td>
</tr>
<tr>
<td>performing operation</td>
<td></td>
</tr>
<tr>
<td>Vasectomy and Salpingectomy—To be performed in licensed hospital</td>
<td>257</td>
</tr>
<tr>
<td><strong>SUBDIVISIONS</strong></td>
<td>258</td>
</tr>
<tr>
<td>Recordation of Plats—When prohibited</td>
<td></td>
</tr>
<tr>
<td>Street Lights—No authority in counties to assess residents requesting</td>
<td>36</td>
</tr>
<tr>
<td>service</td>
<td></td>
</tr>
<tr>
<td>Town Ordinance—Must be uniform, even though effective beyond</td>
<td>259</td>
</tr>
<tr>
<td>corporate limits</td>
<td></td>
</tr>
<tr>
<td><strong>SUNDAY</strong></td>
<td>94</td>
</tr>
<tr>
<td>Fishing—Prohibited in Highland County</td>
<td></td>
</tr>
<tr>
<td>Sale of Alcoholic Beverage—How violations prosecuted</td>
<td>1</td>
</tr>
<tr>
<td>Sunday Closing Law—Construction of pipeline</td>
<td>51</td>
</tr>
<tr>
<td><strong>TAXATION</strong></td>
<td>260</td>
</tr>
<tr>
<td>Antique Dealers—Subject to license requirement although sold at</td>
<td></td>
</tr>
<tr>
<td>antique show sponsored by charitable organization</td>
<td></td>
</tr>
<tr>
<td>Antique Dealers—When license required</td>
<td>260</td>
</tr>
<tr>
<td>Bankruptcy—State taxes not dischargeable</td>
<td>261</td>
</tr>
<tr>
<td>Delinquent—Necessary for Treasurer to obtain judgment before</td>
<td>261</td>
</tr>
<tr>
<td>execution</td>
<td></td>
</tr>
<tr>
<td>Topic</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Exemptions—Church land acquired subsequent to January first</td>
<td>262</td>
</tr>
<tr>
<td>Exemptions—Church-owned building used for parsonage</td>
<td>262</td>
</tr>
<tr>
<td>Exemptions—Church property occupied by sexton—Doubtful</td>
<td>263</td>
</tr>
<tr>
<td>Income Tax—Agents of foreign insurance companies—Responsibility of company for payment</td>
<td>264</td>
</tr>
<tr>
<td>Inheritance Tax—Bank stock</td>
<td>264</td>
</tr>
<tr>
<td>Levies—When special levy may be used for general purposes</td>
<td>265</td>
</tr>
<tr>
<td>License—Cigarette vending machines</td>
<td>266</td>
</tr>
<tr>
<td>License—Coin-operated machines—When localities limited to amount assessed by State</td>
<td>267</td>
</tr>
<tr>
<td>License—Contractors—§ 58-297 interpreted</td>
<td>268</td>
</tr>
<tr>
<td>License—Pool Rooms—Applicable when business commences operation</td>
<td>269</td>
</tr>
<tr>
<td>License—Pool Rooms—Coin-operated tables</td>
<td>270</td>
</tr>
<tr>
<td>Personal Property—Authority of localities to eliminate tax</td>
<td>271</td>
</tr>
<tr>
<td>Personal Property—Motor vehicles owned by Federal employees living within Federal reservations</td>
<td>272</td>
</tr>
<tr>
<td>Personal Property—Owned by resident and located in a town in this State on January 1 and unreported—Subject to assessment by Commissioner of Revenue under § 58-838</td>
<td>274</td>
</tr>
<tr>
<td>Personal Property—Wife not liable when property assessed in name of husband</td>
<td>275</td>
</tr>
<tr>
<td>Personal and Real Property—Land and well equipment</td>
<td>275</td>
</tr>
<tr>
<td>Real Estate—Condemnation—How amount determined before tax rate established</td>
<td>276</td>
</tr>
<tr>
<td>Real Estate—Errors in reassessment—No authority for board of supervisors to petition for correction</td>
<td>276</td>
</tr>
<tr>
<td>Real Estate—Partially constructed buildings—How assessed</td>
<td>277</td>
</tr>
<tr>
<td>Real Estate—When lien attaches to interest of remainderman</td>
<td>278</td>
</tr>
<tr>
<td>Recordation—Applies to lease without option to purchase</td>
<td>279</td>
</tr>
<tr>
<td>Recordation—Deed of Bargain and Sale—Vendor’s lien retained—No additional tax</td>
<td>280</td>
</tr>
<tr>
<td>Recordation—No exemption for deed of trust executed by voluntary fire department</td>
<td>280</td>
</tr>
<tr>
<td>Recordation—Not applicable to instrument substituting one trustee for another</td>
<td>281</td>
</tr>
<tr>
<td>Recordation—Option to purchase real estate</td>
<td>282</td>
</tr>
<tr>
<td>Recordation—Transfer fee to be charged when real estate transferred by will</td>
<td>282</td>
</tr>
<tr>
<td>Tobacco Act—Authority of State Tax Commissioner</td>
<td>290</td>
</tr>
<tr>
<td>Utility Taxes—When assessed against consumers</td>
<td>284</td>
</tr>
<tr>
<td>Wholesale Merchant’s License—When applicable to warehouse storage of alcoholic beverage</td>
<td>284</td>
</tr>
</tbody>
</table>

**TORTS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immunity—School board not liable for injuries on school property</td>
<td>285</td>
</tr>
<tr>
<td>State Institutions—Immunity</td>
<td>285</td>
</tr>
</tbody>
</table>

**TOWNS**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boundaries—How school property lying partly in county may be incor porated in town</td>
<td>237</td>
</tr>
<tr>
<td>Council—How vacancy filled when person elected does not qualify</td>
<td>286</td>
</tr>
<tr>
<td>No Authority to Provide Office for Circuit Court Judge</td>
<td>287</td>
</tr>
<tr>
<td>Ordinances—Subdivision ordinance must be uniform</td>
<td>259</td>
</tr>
<tr>
<td>Topic</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>TRAILER CAMPS</td>
<td></td>
</tr>
<tr>
<td>License Taxes—Must be levied pursuant to State law</td>
<td>288</td>
</tr>
<tr>
<td>Regulation by Counties</td>
<td>289</td>
</tr>
<tr>
<td>TREAURERS</td>
<td></td>
</tr>
<tr>
<td>Deputies—Cannot continue in office when Treasurer's term ceases</td>
<td>290</td>
</tr>
<tr>
<td>Dog Licenses—No duty to collect when city has tax collector</td>
<td>67</td>
</tr>
<tr>
<td>UNFAIR SALES ACT</td>
<td></td>
</tr>
<tr>
<td>Applicability—Virginia Tobacco Tax Act</td>
<td>290</td>
</tr>
<tr>
<td>VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM</td>
<td></td>
</tr>
<tr>
<td>Political Subdivisions—Arlington County not included</td>
<td>234</td>
</tr>
<tr>
<td>WAR</td>
<td></td>
</tr>
<tr>
<td>World War II Terminated</td>
<td>17</td>
</tr>
<tr>
<td>WARRANTS</td>
<td></td>
</tr>
<tr>
<td>Civil—Destruction—When clerk of court may destroy warrants</td>
<td>291</td>
</tr>
<tr>
<td>WATER AND SEWERAGE SYSTEMS</td>
<td></td>
</tr>
<tr>
<td>Bonds—Disposition of proceeds</td>
<td>292</td>
</tr>
<tr>
<td>County Regulation</td>
<td>293</td>
</tr>
<tr>
<td>County Sewer System—Service may be extended to town residents</td>
<td>294</td>
</tr>
<tr>
<td>Public Water Supply—Proximity of sewage facilities</td>
<td>294</td>
</tr>
<tr>
<td>Sanitary Districts—Bond Issue—Purpose must appear in order calling for election</td>
<td>295</td>
</tr>
<tr>
<td>Sanitary Districts—County may pay for services, but not participate in cost</td>
<td>35</td>
</tr>
<tr>
<td>Sanitary Districts—Enlargement—City has no authority</td>
<td>296</td>
</tr>
<tr>
<td>Sanitary Districts—Limitation on acreage to be owned by counties does not apply</td>
<td>31</td>
</tr>
<tr>
<td>Sanitary Districts—No authority to contract with municipality with respect to facilities operated by municipality</td>
<td>297</td>
</tr>
<tr>
<td>Sanitary Districts—Obligations to be paid from revenues collected</td>
<td>298</td>
</tr>
<tr>
<td>Sanitary Districts—Property subject to assessment for payment of bonds</td>
<td>299</td>
</tr>
<tr>
<td>State Water Control Board—When authority ceases—Right of owner to abandon system</td>
<td>299</td>
</tr>
<tr>
<td>Zoning Ordinance—Authority of county over location</td>
<td>300</td>
</tr>
<tr>
<td>WELFARE</td>
<td></td>
</tr>
<tr>
<td>Dependent Child—Ineligible for relief when residing within Federal area when exclusive jurisdiction ceded</td>
<td>302</td>
</tr>
<tr>
<td>Liens Against Property—When clerk to record</td>
<td>225</td>
</tr>
<tr>
<td>Lien Created Against Land of Recipient—No authority in local board to waive or release</td>
<td>304</td>
</tr>
<tr>
<td>WITNESSES</td>
<td></td>
</tr>
<tr>
<td>Allowance—When medical examiners entitled to fees and expenses</td>
<td>304</td>
</tr>
<tr>
<td>Fees—Appearance before grand jury</td>
<td>65</td>
</tr>
<tr>
<td>Immunity from Prosecution—Attorney for Commonwealth may not promise immunity in order to induce witness to waive constitutional privilege</td>
<td>305</td>
</tr>
<tr>
<td>ZONING</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Appeals</td>
<td>306</td>
</tr>
<tr>
<td>Board of Zoning Appeals—Effect of 1962 legislative changes</td>
<td>308</td>
</tr>
<tr>
<td>Board of Zoning Appeals—Effect of 1962 legislative changes when existing board conforms to new law</td>
<td>308</td>
</tr>
<tr>
<td>Cemeteries—Additional ordinance unnecessary when procedure provided in ordinance</td>
<td>309</td>
</tr>
<tr>
<td>Ordinance—Amendments—Referendum necessary in Albemarle County</td>
<td>310</td>
</tr>
<tr>
<td>Ordinance—Effect of repeal of statute requiring referendum</td>
<td>311</td>
</tr>
<tr>
<td>Ordinance—Hearing required before planning commission submits proposal to governing body</td>
<td>312</td>
</tr>
<tr>
<td>Ordinance—Public Hearing—No waiting period required between hearing of planning commission and governing body</td>
<td>313</td>
</tr>
<tr>
<td>Planning Commission—Applicability of Chapter 28 of Title 15—When effective, now existing commission affected, and authority of council to alter</td>
<td>314</td>
</tr>
<tr>
<td>Public Hearing—Two hearings mandatory before ordinance may be amended</td>
<td>315</td>
</tr>
</tbody>
</table>
### STATUTES AND CONSTITUTIONAL PROVISIONS REFERRED TO IN OPINIONS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ACTS OF ASSEMBLY</strong></td>
<td></td>
</tr>
<tr>
<td>Acts of 1908</td>
<td>121</td>
</tr>
<tr>
<td>Acts of 1918</td>
<td>303</td>
</tr>
<tr>
<td>Acts of 1930</td>
<td>94</td>
</tr>
<tr>
<td>Acts of 1932</td>
<td>104</td>
</tr>
<tr>
<td>Acts of 1938</td>
<td>203</td>
</tr>
<tr>
<td>Acts of 1940</td>
<td>181</td>
</tr>
<tr>
<td>Acts of 1942</td>
<td>37, 38</td>
</tr>
<tr>
<td>Acts of 1947</td>
<td>117</td>
</tr>
<tr>
<td>Acts of 1948</td>
<td>59</td>
</tr>
<tr>
<td>Acts of 1954</td>
<td>185</td>
</tr>
<tr>
<td>Acts of 1956</td>
<td>96</td>
</tr>
<tr>
<td>Acts of 1958</td>
<td>7</td>
</tr>
<tr>
<td>Acts of 1960</td>
<td>262</td>
</tr>
<tr>
<td>Acts of 1962</td>
<td>284</td>
</tr>
<tr>
<td>4</td>
<td>284</td>
</tr>
<tr>
<td>55</td>
<td>222</td>
</tr>
<tr>
<td>77</td>
<td>233</td>
</tr>
<tr>
<td>125</td>
<td>187</td>
</tr>
<tr>
<td>147</td>
<td>38</td>
</tr>
<tr>
<td>155</td>
<td>23</td>
</tr>
<tr>
<td>178</td>
<td>252, 253</td>
</tr>
<tr>
<td>211</td>
<td>14, 297</td>
</tr>
<tr>
<td>216</td>
<td>34, 45</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CODE OF 1887</strong></td>
<td></td>
</tr>
<tr>
<td>1414</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Code of 1887</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CODE OF 1950</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1-13(33)</td>
<td>200</td>
<td></td>
</tr>
<tr>
<td>2-27</td>
<td>210, 211, 212</td>
<td></td>
</tr>
<tr>
<td>2-29</td>
<td>210, 211, 212, 213, 221</td>
<td></td>
</tr>
<tr>
<td>2-57.01</td>
<td>251</td>
<td></td>
</tr>
<tr>
<td>2-77.12</td>
<td>252</td>
<td></td>
</tr>
<tr>
<td>2-297(5)</td>
<td>65</td>
<td></td>
</tr>
<tr>
<td>2-298</td>
<td>65</td>
<td></td>
</tr>
<tr>
<td>2-299</td>
<td>65</td>
<td></td>
</tr>
<tr>
<td>Title 2, Ch. 4</td>
<td>210</td>
<td></td>
</tr>
<tr>
<td>4-1 thru 4-98</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4-2</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4-36</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4-38</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>4-58</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4-60</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>4-81.1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4-84(a)</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4-84.1</td>
<td>2, 3</td>
<td></td>
</tr>
<tr>
<td>4-98(4)</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4-96</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>4-97</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>4-99</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>4-114</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Title 4, Ch. 1</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Title 4, Ch. 1, Art. 8</td>
<td>67</td>
<td></td>
</tr>
<tr>
<td>5-39</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>Title 5, Ch. 3, Art. 2</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>6-26</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>6-27.1</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>6-27.2</td>
<td>6, 7</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
<td>Section</td>
</tr>
<tr>
<td>---------------</td>
<td>----------</td>
<td>---------------</td>
</tr>
<tr>
<td>CODE OF 1950—Continued</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7-18</td>
<td>181, 273</td>
<td>15-8</td>
</tr>
<tr>
<td>7-19</td>
<td>29, 181, 273, 303</td>
<td>15-8(2)</td>
</tr>
<tr>
<td>7-21</td>
<td>181, 273</td>
<td>15-8(5)</td>
</tr>
<tr>
<td>7-24</td>
<td>181</td>
<td>15-9</td>
</tr>
<tr>
<td>Title 7, Ch. 3</td>
<td>273</td>
<td>15-10</td>
</tr>
<tr>
<td>8-13</td>
<td>249</td>
<td>15-12</td>
</tr>
<tr>
<td>8-35</td>
<td>249</td>
<td>15-13.3</td>
</tr>
<tr>
<td>8-51</td>
<td>199</td>
<td>15-20.8</td>
</tr>
<tr>
<td>8-54</td>
<td>199</td>
<td>15-59</td>
</tr>
<tr>
<td>8-81</td>
<td>199</td>
<td>15-60</td>
</tr>
<tr>
<td>8-204</td>
<td>25</td>
<td>15-61</td>
</tr>
<tr>
<td>8-373</td>
<td>20</td>
<td>15-62</td>
</tr>
<tr>
<td>8-388</td>
<td>20</td>
<td>15-63</td>
</tr>
<tr>
<td>8-428</td>
<td>246</td>
<td>15-66.1</td>
</tr>
<tr>
<td>8-429</td>
<td>102, 245</td>
<td>15-66.6</td>
</tr>
<tr>
<td>8-448</td>
<td>102</td>
<td>15-66.6</td>
</tr>
<tr>
<td>8-752, et seq</td>
<td>286</td>
<td>15-66.6</td>
</tr>
<tr>
<td>10-62</td>
<td>90</td>
<td>15-240</td>
</tr>
<tr>
<td>10-74.1, et seq</td>
<td>201</td>
<td>15-242</td>
</tr>
<tr>
<td>10-76</td>
<td>201</td>
<td>15-243</td>
</tr>
<tr>
<td>10-76.1</td>
<td>201</td>
<td>15-222</td>
</tr>
<tr>
<td>10-79</td>
<td>201</td>
<td>15-245</td>
</tr>
<tr>
<td>10-83</td>
<td>201</td>
<td>15-250</td>
</tr>
<tr>
<td>10-124</td>
<td>252</td>
<td>15-251</td>
</tr>
<tr>
<td>10-125</td>
<td>252</td>
<td>15-257</td>
</tr>
<tr>
<td>10-125.1</td>
<td>250</td>
<td>15-274.1</td>
</tr>
<tr>
<td>Title 10, Ch. 4, Art. 4</td>
<td>90</td>
<td>15-350</td>
</tr>
<tr>
<td>Title 10, Ch. 4, Art. 6</td>
<td>201</td>
<td>15-352</td>
</tr>
<tr>
<td>14-8.1</td>
<td>222</td>
<td>15-381</td>
</tr>
<tr>
<td>14-56.1</td>
<td>7, 8</td>
<td>15-392</td>
</tr>
<tr>
<td>14-57</td>
<td>7</td>
<td>15-393</td>
</tr>
<tr>
<td>14-82</td>
<td>40</td>
<td>15-401</td>
</tr>
<tr>
<td>13-83</td>
<td>247</td>
<td>15-417</td>
</tr>
<tr>
<td>14-87</td>
<td>244, 245</td>
<td>15-420</td>
</tr>
<tr>
<td>14-116</td>
<td>40</td>
<td>15-422</td>
</tr>
<tr>
<td>14-116(13)</td>
<td>244</td>
<td>15-423</td>
</tr>
<tr>
<td>14-120</td>
<td>102, 245</td>
<td>15-485</td>
</tr>
<tr>
<td>14-122</td>
<td>247</td>
<td>15-486</td>
</tr>
<tr>
<td>14-123</td>
<td>247</td>
<td>15-487</td>
</tr>
<tr>
<td>14-124</td>
<td>19</td>
<td>15-487.1</td>
</tr>
<tr>
<td>14-124.1</td>
<td>18</td>
<td>15-488</td>
</tr>
<tr>
<td>14-132</td>
<td>57, 151</td>
<td>15-504</td>
</tr>
<tr>
<td>14-132(6)</td>
<td>57</td>
<td>15-508</td>
</tr>
<tr>
<td>14-145</td>
<td>19</td>
<td>15-551.1</td>
</tr>
<tr>
<td>14-163.1</td>
<td>30</td>
<td>15-551.3</td>
</tr>
<tr>
<td>14-173</td>
<td>40</td>
<td>15-551.8</td>
</tr>
<tr>
<td>14-181</td>
<td>5</td>
<td>15-553</td>
</tr>
<tr>
<td>14-186</td>
<td>66</td>
<td>15-666.32:1</td>
</tr>
<tr>
<td>14-195</td>
<td>40</td>
<td>15-666.48</td>
</tr>
<tr>
<td>14-422</td>
<td>74</td>
<td>15-666.63</td>
</tr>
<tr>
<td>Title 14, Ch. 1, Art. 4</td>
<td>287</td>
<td>15-666.64</td>
</tr>
<tr>
<td>Title 14, Ch. 1, Art. 9</td>
<td>247</td>
<td>15-666.65</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
<td></td>
</tr>
<tr>
<td>15-666.73</td>
<td>65</td>
<td></td>
</tr>
<tr>
<td>15-666.77</td>
<td>72</td>
<td></td>
</tr>
<tr>
<td>15-688</td>
<td>31, 32</td>
<td></td>
</tr>
<tr>
<td>15-692.2</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>15-692.3</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>15-699</td>
<td>37</td>
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<td>30, 65, 292</td>
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<td>102</td>
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<td>289</td>
</tr>
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<td>37-47</td>
<td>123, 124</td>
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<td>37-48</td>
<td>123, 124</td>
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<td>124, 126</td>
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<td>126</td>
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<td>256, 257</td>
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<td>118</td>
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<td>190</td>
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<td>133</td>
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<td>46.1-1(16)</td>
<td>125</td>
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<td>177, 178, 180</td>
</tr>
<tr>
<td>46.1-1(18)</td>
<td>190, 191</td>
</tr>
<tr>
<td>46.1-1(35)</td>
<td>171, 190</td>
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<td>188, 192</td>
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<tr>
<td>46.1-41</td>
<td>191, 192, 197, 198</td>
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<td>175, 176</td>
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<td>173</td>
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<td>46.1-59</td>
<td>131, 132</td>
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<td>46.1-64</td>
<td>176</td>
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<td>46.1-65</td>
<td>178, 179, 188</td>
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<td>46.1-66</td>
<td>178, 188</td>
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<td>195, 196</td>
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<td>46.1-140</td>
<td>170, 171</td>
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<td>170, 171</td>
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<td>46.1-159</td>
<td>175, 176</td>
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<td>46.1-167.1</td>
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<td>46.1-167.3</td>
<td>197, 198</td>
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<td>46.1-167.4</td>
<td>131, 192, 198</td>
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<td>50, 189</td>
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<td>173, 184</td>
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<td>131, 132</td>
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<td>174, 175</td>
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<td>Title 46.1, Ch. 5</td>
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<td>133, 134</td>
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<td>267, 268</td>
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<td>224, 265</td>
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<td>276</td>
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<td>275</td>
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<td>Title 58, Ch. 7, Art. 11</td>
<td>267</td>
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<td>Title 58, Ch. 7, Art. 12</td>
<td>267, 268</td>
</tr>
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<td>Title 58, Ch. 12</td>
<td>192</td>
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<tr>
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<td>291</td>
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<td>Title 58, Ch. 15, Art. 5</td>
<td>276</td>
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<td>Title 58, Ch. 16</td>
<td>274</td>
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<td>Title 58, Ch. 20</td>
<td>275</td>
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<td>291</td>
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<td>291</td>
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<td>4, 129</td>
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<td>225, 304</td>
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<td>302</td>
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<td>303</td>
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<td>225</td>
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**CONSTITUTION OF VIRGINIA**

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<thead>
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<th>Section</th>
<th>Page</th>
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<tbody>
<tr>
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<td>18</td>
<td>87, 88</td>
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<td>13, 17</td>
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<td>292</td>
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